8 No. 98-1696-CFH Title: United States, Petitioner
v.
Roy Lee Johnson

Docketed:
April 21, 1999

Court: United States Court of Appeals for the Sixth Circuit

| Entry | Date | Proceedings and Orders |
|---|---|---|
| | Apr 21 1999 | Petition for writ of certiorari filed. (Response due May 21, 1999) |
| | May 3 1999 | Waiver of right of respondent Roy Lee Johnson to respond filed. |
| | May 4 1999 | DISTRIBUTED. May 20, 1999 |
| | May 12 1999 | Response requested. (Due June 14, 1999 - NONE RECEIVED) |
| | Jun 16 1999 | Brief of respondent Roy Lee Johnson in opposition received. |
| | Jun 22 1999 | Reply brief of petitioner United States filed. |
| | Jun 23 1999 | REDISTRIBUTED. September 27, 1999 |
| | Sep 10 1999 | Petition GRANTED. The brief of petitioner is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday, October 22, 1999. The brief of respondent is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday, November 19, 1999. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Wednesday, December 1, 1999. Rule 29.2 does not apply.<br>SET FOR ARGUMENT December 8, 1999.<br>********** |
| | Oct 8 1999 | Record filed. |
| | Oct 15 1999 | Motion of Solicitor General to dispense with printing the joint appendix filed. |
| | Oct 22 1999 | Brief of petitioner United States filed. |
| | Oct 28 1999 | Motion to dispense with printing the joint appendix DISTRIBUTED (October 29, 1999). |
| | Nov 1 1999 | Motion of Solicitor General to dispense with printing the joint appendix GRANTED. |
| | Nov 3 1999 | Record filed. |
| | Nov 4 1999 | CIRCULATED. |
| | Nov 19 1999 | Brief of respondent Roy Lee Johnson filed. |
| | Nov 19 1999 | Brief amicus curiae of National Association of Criminal Defense Lawyers, et al. filed. |
| | Dec 1 1999 | Reply brief of petitioner United States filed. |



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Supreme Court, U.S.
FILED

981696 APR 21 1999

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No.

# In the Supreme Court of the United States

OCTOBER TERM, 1998

UNITED STATES OF AMERICA, PETITIONER

*v.*

ROY LEE JOHNSON

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT*

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED

Whether a federal criminal defendant's term of supervised release commences on the date of his actual release from prison or on the earlier date on which he should have been released in accordance with a retroactively applied change in the law.

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# In the Supreme Court of the United States

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No.

UNITED STATES OF AMERICA, PETITIONER

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ROY LEE JOHNSON

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT*

## PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the United States, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

### OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-8a) is reported at 154 F.3d 569. The opinion of the district court (App., *infra*, 9a-17a) is unreported.

### JURISDICTION

The judgment of the court of appeals was entered on August 26, 1998. A petition for rehearing was denied on January 21, 1999. App., *infra*, 18a. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATUTORY PROVISIONS INVOLVED

The relevant provisions of Title 18 of the United States Code are reproduced at App., *infra*, 19a-26a.

## STATEMENT

1. In 1990, after a jury trial in the United States District Court for the Eastern District of Michigan, respondent was convicted on five counts: two counts of possession of narcotics with intent to distribute them, in violation of 21 U.S.C. 841(a); two counts of use of a firearm during and in relation to a drug trafficking offense, in violation of 18 U.S.C. 924(c); and one count of possession of a firearm after having previously been convicted of a felony, in violation of 18 U.S.C. 922(g). He was sentenced to a total of 171 months' imprisonment, consisting of three concurrent 51-month terms on the Section 841(a) and Section 922(g) counts, to be followed by two consecutive 60-month terms on the Section 924(c) counts. The court imposed a mandatory three-year term of supervised release on the Section 841(a) counts. See 21 U.S.C. 841(b)(1)(C). The court of appeals, while otherwise affirming respondent's convictions and sentence, held that the district court erred in imposing consecutive terms of imprisonment on the two Section 924(c) counts. On remand, the district court vacated one of respondent's Section 924(c) convictions, thereby reducing his total term of imprisonment to 111 months. App., *infra*, 1a-2a, 10a-11a.

After this Court's decision in *Bailey* v. *United States*, 516 U.S. 137 (1995), respondent filed a motion, pursuant to 28 U.S.C. 2255, to vacate his remaining conviction under 18 U.S.C. 924(c). He contended that the conviction was predicated on a construction of Section 924(c) that was rejected by this Court in *Bailey*. The United States did not oppose the motion. The district court



vacated the Section 924(c) conviction and, because respondent had served more than the 51 months' imprisonment to which he had been sentenced on his remaining convictions, ordered his immediate release from prison. App., *infra*, 2a, 12a.

Respondent then moved to vacate the remainder of his three-year term of supervised release on the Section 841(a) counts. He argued that his term of supervised release should be reduced to account for the two and one-half years that he spent in prison as a result of the Sixth Circuit's erroneous interpretation of Section 924(c). The district court denied the motion. App., *infra*, 15a-17a. The court relied on both the text and the purpose of the statutory provisions governing supervised release. The court explained that 18 U.S.C. 3624(e) provides that a person's "term of supervised release commences on the day the person is released from imprisonment" and "does not run during any period in which the person is imprisoned in connection with a conviction for a Federal, State or local crime." App., *infra*, 15a (quoting 18 U.S.C. 3624(e)). The court also recognized that "supervised release and imprisonment fulfill distinct purposes," because supervised release, unlike imprisonment, is designed "to aid the defendant's transition from incarceration to life in the community." *Ibid.*

2. A divided panel of the Sixth Circuit reversed. The panel held that respondent's term of supervised release began on "the date he was entitled to be released" from prison under a sentence that excluded the subsequently vacated Section 924(c) conviction, "rather than the day he walked out the prison door." App., *infra*, 4a.

The panel acknowledged that the text of 18 U.S.C. 3624(e), if "[r]ead in isolation," would support the dis-

trict court's position that a person's term of supervised release does not begin until he is actually released from prison. App., *infra*, 4a. But the panel believed that such a reading would be inconsistent with 18 U.S.C. 3624(a), another section of the same statute, which states that "[a] prisoner shall be released by the Bureau of Prisons on the date of the expiration of [his] term of imprisonment." The panel viewed Section 3624(a) as "embod[ying] Congress's intent that a prisoner not be held in prison following the expiration of a valid prison term." App., *infra*, 4a. "In light of th[at] policy," the panel held that respondent, whose Section 924(c) conviction was invalid, should not be considered to have been "imprisoned in connection with a conviction for a Federal . . . crime," within the meaning of Section 3624(e), during his final two and one-half years in prison. *Ibid.* (quoting 18 U.S.C. 3624(e)).

The panel rejected the argument that incarceration and supervised release serve distinct purposes and, accordingly, that prison time cannot be credited against time on supervised release. The panel acknowledged that supervised release is primarily designed to serve rehabilitative purposes, but placed emphasis on the conclusion that supervised release "is also punitive in nature." App., *infra*, 5a.

The panel expressly noted the circuit conflict on the question. App., *infra*, 3a. It "decline[d] to follow the position * * * adopted by the First and Eighth Circuits," in *United States* v. *Joseph*, 109 F.3d 34 (1st Cir. 1997), and *United States* v. *Douglas*, 88 F.3d 533 (8th Cir. 1996) (per curiam), and instead chose to follow the Ninth Circuit's decision in *United States* v. *Blake*, 88 F.3d 824 (1996). App., *infra*, 4a.

Judge Gilman dissented. He argued that reducing a defendant's term of supervised release to account for



excess time served in prison "is contrary to both the plain language and the purpose of 18 U.S.C. § 3624(e)." App., *infra*, 6a. He viewed the text of Section 3624(e) as "clear and unconditional in its requirements" that a term of supervised release begin only when "the person is released from imprisonment" and "not run during any period in which the person is imprisoned." *Id.* at 6a-7a (quoting 18 U.S.C. 3624(e)). He also observed that the purpose of supervised release—"to facilitate the integration of the violator into the community, while providing the supervision designed to limit further criminal conduct"—is not served until the violator is actually in the community. *Id.* at 7a (internal quotation marks omitted). Finally, he pointed out that 18 U.S.C. 3583(e), which permits a district court to cut short a term of supervised release after one year if "warranted by the conduct of the defendant released and the interest of justice," provides a means for individuals such as respondent to be excused from a lengthy term of supervised release. App., *infra*, 8a.

The United States filed a petition for rehearing and suggested rehearing en banc. The court of appeals denied rehearing en banc, noting that "less than a majority of the judges ha[d] favored the suggestion." Judge Gilman would have granted panel rehearing. App., *infra*, 18a.

## REASONS FOR GRANTING THE PETITION

The court of appeals held in this case that a federal criminal defendant's term of supervised release begins not on the date on which he is actually released from prison, but on the earlier date on which he should have been released under a retroactively applied change in the law. Any excess time that the defendant has spent in prison, as a result of a conviction or sentence that is

subsequently vacated, is thus credited against any time that he still must spend on supervised release. That decision deepens a conflict among the courts of appeals. The First, Fifth, and Eighth Circuits have all held that a defendant's term of supervised release cannot commence until he has, in fact, walked out the prison door. The Ninth Circuit, like the Sixth Circuit in this case, has reached a contrary conclusion. The position of the Sixth and Ninth Circuits is inconsistent, moreover, with the text and purpose of the statutes governing supervised release. Not only has Congress described a term of supervised release as commencing "after imprisonment," 18 U.S.C. 3583(a), not during imprisonment. But Congress has specifically provided that a "term of supervised release commences on the day the person is released from imprisonment" and "does not run during any period in which the person is imprisoned." 18 U.S.C. 3624(e). Congress did not carve out any exception to that straightforward rule for defendants, such as respondent here, whose term of imprisonment is reduced to less than time served. Nor is the purpose of supervised release—to facilitate the successful integration of newly released prisoners into the community—advanced if excess prison time can be credited against time on supervised release. An individual's need for monitoring and guidance as he reenters society is not diminished merely because he has spent more time in prison than is provided by his corrected sentence. Because the issue in this case is recurring and important, the court of appeals' erroneous holding warrants this Court's review.

1. There is a square conflict among the circuits about whether a district court, after reducing a defendant's term of imprisonment to less than time served because of a retroactively applied change in the law, must credit



the defendant's excess time in prison against the time that he still must spend on supervised release. The Sixth Circuit answered that question in the affirmative in this case. The court concluded that a defendant's term of supervised release must be deemed to have commenced "on the date he should have been released [from prison] according to his revised sentence," not on the date that he was actually released from prison after the revised sentence was imposed. App., *infra*, 1a. The court's decision is consistent with the Ninth Circuit's ruling in *United States* v. *Blake*, 88 F.3d 824, 825 (1996), which concluded that a defendant's term of supervised release begins on the date that he should have been released from prison under a retroactive application of a clarifying amendment to the Sentencing Guidelines, and not on the date of his actual release.

In contrast, the First, Fifth, and Eighth Circuits have held that "supervised release terms commence on the actual release date," not the date on which the defendant should have been released under a revised sentence. *United States* v. *Joseph*, 109 F.3d 34, 35 (1st Cir. 1997); accord *United States* v. *Jeanes*, 150 F.3d 483, 485 (5th Cir. 1998); *United States* v. *Douglas*, 88 F.3d 533, 534 (8th Cir. 1996) (per curiam).[1] Those courts have thus concluded that a defendant is not "entitled to reduction or termination of his supervised release term as compensation for the time served on [a] wrongful conviction and sentence." *Jeanes*, 150 F.3d at 485. *Joseph* and *Jeanes*, like the present case, involved defendants whose convictions under 18 U.S.C. 924(c) were vacated on the authority of *Bailey* v. *United*

[1] A panel of the Tenth Circuit applied the same rule in an unpublished disposition. *United States* v. *Jaramillo*, No. 98-2005, 1998 WL 536387 (Aug. 18, 1998).

*States*, 516 U.S. 137 (1995). *Douglas*, like *Blake*, involved a defendant whose sentence was reduced as a result of a retroactively applied amendment to the Sentencing Guidelines.[2]

The court of appeals acknowledged the circuit conflict on the question presented by this case, observing that "[t]he First and Eighth Circuits have adopted a contrary approach" than has the Ninth Circuit. App., *infra*, 3a (citing *Joseph*, *Douglas*, and *Blake*). It then expressly "decline[d] to follow the position * * * adopted by the First and Eighth Circuits." *Id.* at 4a. The conflict has also been recognized by other courts. See *Joseph*, 109 F.3d at 37-38 (citing *Douglas* and *Blake*); *United States* v. *Reider*, 103 F.3d 99, 103 (10th Cir. 1996) (noting "contrary approach[es]" of *Douglas* and *Blake*); *United States* v. *Penn*, 17 F. Supp. 2d 440, 442 (D. Md. 1998) (noting "disagree[ment]" between *Joseph* and *Blake*).

2. The court of appeals erred in holding that a defendant's term of supervised release commences either on the date that he is actually released from prison or on the date that he should have been released

[2] The Sentencing Guidelines have since been amended so as to prevent the result reached in *Blake*. Under the amended Guidelines provision, while a court may reduce a term of imprisonment because of a retroactive reduction in the applicable Guidelines range, "in no event may the reduced term of imprisonment be less than the term of imprisonment the defendant has already served." Sentencing Guidelines § 1B1.10(b). Accordingly, a retroactive amendment of the Guidelines cannot result in the conclusion that a prisoner should have been released at an earlier date than time served. The Ninth Circuit's reasoning in *Blake*, however, would still apply to defendants whose terms of imprisonment are held invalid, after the date on which they should have been released, for other reasons, *e.g.*, the retroactive invalidation of a conviction because of a change in the law defining the offense.



under his revised sentence, whichever is earlier. As the dissenting judge explained, such a holding "is contrary to both the plain language and the purpose" of the statutory provisions governing supervised release. App., *infra*, 6a.

a. The statutory term "supervised release," even standing alone, undermines the court of appeals' position. The word "release" is an antonym of the words "detention" and "imprisonment." See William D. Lutz, *The Cambridge Thesaurus of American English* 387 (1994) (release/detention); *The Penguin Dictionary of English Synonyms and Antonyms* 344 (1992) (release/imprisonment); see also *Webster's Dictionary of Synonyms* 690 (1942) ("release" is an antonym of "[d]etain (*as a prisoner*)"). In accordance with common English usage, then, a defendant cannot be both imprisoned and released at the same time. Cf. *Reno* v. *Koray*, 515 U.S. 50, 57 (1995) (contrasting "release" and "detention" under the Bail Reform Act of 1984, 18 U.S.C. 3141 *et seq.*).

Congress intended that a term of supervised release was to begin after, not during, a term of imprisonment. The statute authorizing district courts to impose supervised release as part of a defendant's sentence, 18 U.S.C. 3583, is titled "Inclusion of a term of supervised release *after imprisonment*" (emphasis added). The initial sentence of that statute states that "[t]he court, in imposing a sentence to a term of imprisonment for a felony or a misdemeanor, may include as a part of the sentence a requirement that the defendant be placed on a term of supervised release *after imprisonment*." 18 U.S.C. 3583(a) (emphasis added). The Senate Report on the provision that became Section 3583 is in accord. See S. Rep. No. 225, 98th Cong., 1st Sess. 123 (1983) ("This section permits the court, in imposing a term of

imprisonment for a felony or a misdemeanor, to include as part of the sentence a requirement that the defendant serve a term of supervised release *after he has served the term of imprisonment.*") (emphasis added); see also *Gozlon-Peretz* v. *United States*, 498 U.S. 395, 407 (1991) ("[s]upervised release is a unique method of post-confinement supervision invented by the Congress").

Congress's intent that a defendant's term of supervised release begin only after his actual release from prison is confirmed by 18 U.S.C. 3624(e), the statutory provision titled "SUPERVISION AFTER RELEASE."[3] Section 3624(e) states that a person's "term of supervised release commences on the day [he] is released from imprisonment" and "does not run during any period in which [he] is imprisoned in connection with a conviction for a Federal, State, or local crime." That language is clear, straightforward, and unambiguous. It cannot sensibly be construed to mean that a term of supervised release begins *either* on the date of release *or* on some earlier date on which a person should have been released under a retroactively applied change in the law. See *Joseph*, 109 F.3d at 38 (recognizing that "the language in § 3624(e) must be given its plain and literal meaning," *i.e.*, that "a person's term of supervised release does not begin until the person has been released from prison") (quoting *Quinones* v. *United States*, 936 F. Supp. 153, 155 (S.D.N.Y. 1996)).

[3] Section 3582, which is part of the chapter of the Criminal Code titled "SENTENCES," is primarily concerned with the district courts' role at the time of sentencing with respect to supervised release. Section 3624(e), which is part of the chapter of the Criminal Code titled "POSTSENTENCE ADMINISTRATION," is concerned with the implementation of a sentencing term imposing supervised release.



The court of appeals conceded in this case that Section 3624(e), "[r]ead in isolation, * * * undercut[s] [respondent's] argument that he should receive credit for the extra time he spent in prison" against his term of supervised release. App., *infra*, 4a. The court reasoned, however, that Section 3624(e) must be read together with Section 3624(a), which states that "[a] prisoner shall be released by the Bureau of Prisons on the date of the expiration of [his] term of imprisonment." But Section 3624(a) does not speak to the issue here. It surely does not suggest that a defendant's term of imprisonment should be deemed to "expir[e]" on any date other than that dictated by the sentence imposed by the district court. A contrary construction of Section 3624(a) would suggest that the Bureau of Prisons itself must determine whether a defendant's term of imprisonment has "expir[ed]" as of some earlier date based on a change in the law. That is the sort of determination that Congress, in 28 U.S.C. 2255, has assigned exclusively to the sentencing court.

b. The conclusion that a term of supervised release commences only when a defendant is actually released from prison—and not on an earlier date when, in retrospect, he should have been released—comports with Congress's principal purpose in authorizing district courts to include a term of supervised released in a defendant's sentence. Congress explained that "the primary goal of such a term is to ease the defendant's transition into the community after the service of a long prison term for a particularly serious offense, or to provide rehabilitation to a defendant who has spent a fairly short period in prison for punishment or other purposes but still needs supervision and training programs after release." S. Rep. No. 225, *supra*, at 124. Congress added that supervised release was not

designed to serve "the sentencing purposes of incapacitation and punishment." *Ibid.*; see also Sentencing Guidelines § 5D1.1, Application Note 1 (recognizing that the purposes of supervised release include "to protect the public welfare" and "to assist the reintegration of the defendant into the community").

Congress thus contemplated that supervised release would serve purposes distinct from incarceration. It would aid a defendant in making his "transition into the community" after his release from prison—for example, by assisting him in obtaining vocational training, medical treatment, or substance abuse counseling. See Sentencing Guidelines § 5D1.3 (enumerating mandatory and discretionary conditions of supervised release). It would at the same time provide a measure of security to the community into which the defendant is released by enabling the United States Probation Office to monitor him during the transition period. Those purposes cannot effectively be served until the defendant is present in the community. The mere fact that a defendant has spent more time in prison, serving a sentence that is subsequently invalidated, offers no assurance that his transition into the community will be any less problematic. To the contrary, as the Senate Report recognized, a defendant who is returning to the community "after the service of a long prison term" may be particularly in need of supervision. S. Rep. No. 225, *supra*, at 124. The court of appeals thus erred in treating prison time as interchangeable with time on supervised release. See *Joseph*, 109 F.3d at 38-39 ("[S]upervised release is intended to facilitate the integration of the violator into the community, while providing the supervision designed to limit further criminal conduct. * * * Incarceration, to the contrary, does nothing to assist a defendant's transition back into



society and is not a reasonable substitute for a portion of the supervised release term.") (internal quotation marks omitted).

c. A defendant is not without a means of seeking relief from an unduly harsh term of supervised release. Congress has provided that a district court may "terminate a term of supervised release and discharge the defendant released at any time after the expiration of one year of supervised release * * * if it is satisfied that such action is warranted by the conduct of the defendant released and the interest of justice." 18 U.S.C. 3583(e)(1). As the Fifth Circuit has suggested, in assessing whether a defendant's supervised release should be terminated early in "the interest of justice," a district court "may take into account the fact that a defendant served time under a wrongful conviction and sentence." *Jeanes*, 150 F.3d at 485; accord *Joseph*, 109 F.3d at 39.[4]

3. This case presents an important and recurring issue of federal law. Whenever this Court concludes that the substantive scope of a federal criminal statute does not reach as far as some or all courts of appeals

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[4] As noted above, the Sentencing Commission has similarly provided that, in cases where a defendant has served more time in prison than would be required under an amendment to the Sentencing Guidelines, the district court cannot reduce the defendant's sentence to less than time served. Sentencing Guidelines § 1B1.10(b). The court may, however, take the defendant's excess prison time into account as part of the totality of circumstances bearing on whether to grant a motion for early termination of supervised release under Section 3583(e)(1), although "the fact that a defendant may have served a longer term of imprisonment than the court determines would have been appropriate in view of the amended guideline range shall not, without more, provide a basis for early termination of supervised release." Sentencing Guidelines § 1B1.10, Application Note 5.

had thought, as occurred in *Bailey*, many defendants incarcerated for violations of the statute may successfully move to have their convictions vacated. Cf. *Bousley* v. *United States*, 523 U.S. 614 (1998). And those motions may often result in a reduction in such a defendant's total term of imprisonment to less than the time that he has already served. In virtually any case in which the defendant also was convicted under another statute that was not affected by the Court's decision, the defendant still is potentially subject to a term of supervised release after his discharge from prison. See Sentencing Guidelines § 5D1.1 (providing that "[t]he court *shall* order a term of supervised release to follow imprisonment when a sentence of imprisonment of more than one year is imposed, or when required by statute," and "*may* order a term of supervised release to follow imprisonment in any other case") (emphases added).

The question whether such a defendant may be required to serve his full term of supervised release, or is entitled to a reduction or termination of that term as compensation for the excess time that he spent in prison, is significant for the government, recently released defendants, and the communities into which they are released. It affects the extent to which the United States Probation Office may exercise supervision over many recently released defendants—supervision that Congress and the Sentencing Commission have deemed vital to such defendants' transition into society. See S. Rep. No. 225, *supra*, at 124; Sentencing Guidelines § 5D1.1. The question has divided the circuits that have recently considered it in cases involving convictions vacated as a result of *Bailey*. It will continue to do so until resolved by this Court.



## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APRIL 1999

**APPENDIX A**

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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No. 97-1151

ROY LEE JOHNSON, PETITIONER-APPELLANT

*v.*

UNITED STATES OF AMERICA, RESPONDENT-APPELLEE

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Argued: August 4, 1998
Decided: August 26, 1998

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**OPINION**

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Before: MERRIT, KENNEDY, and GILMAN, Circuit Judges.

MERRITT, Circuit Judge.

This appeal from the District Court's partial denial of petitioner Roy Lee Johnson's motion to modify his sentence under 28 U.S.C. § 2255 raises a single issue: When a criminal defendant's sentence of imprisonment is reduced below the time he has already served, does his term of supervised release commence on the date of his actual release or on the date he should have been released according to his revised sentence?

In 1990 a jury convicted Johnson of five separate offenses: (1) possession with intent to distribute cocaine

in violation of 21 U.S.C. § 841(a); (2) use of firearms during and relating to the cocaine trafficking offense in violation of 18 U.S.C. § 924(c); (3) possession with intent to distribute Dilaudid in violation of § 841(a); (4) use of a firearm during and relating to the Dilaudid trafficking offense in violation of § 924(c); and (5) possession of a firearm after having previously been convicted of a felony in violation of 18 U.S.C. § 922(g). Johnson's sentence of 171 months imprisonment included two consecutive five-year terms for the § 924(c) offenses. The court also imposed a three-year term of supervised release on the drug charges. A panel of this Court affirmed the conviction in all respects, but on rehearing, we held that the District Court erred in sentencing Johnson to consecutive terms of imprisonment for the two § 924(c) violations. *United States v. Johnson*, 25 F.3d 1335, 1337-38 (6th Cir. 1994) (en banc). In August 1994, District Judge Horace Gilmore resentenced Johnson to concurrent five-year terms for the § 924(c) convictions. Johnson filed a motion under 28 U.S.C. § 2255 in March 1996, and Judge Gilmore vacated the two § 924(c) convictions in light of the Supreme Court's new decision in *Bailey v. United States*, 516 U.S. 137, 116 S. Ct. 501, 133 L. Ed. 2d 472 (1995). Because Johnson had already served more time in prison than called for under the revised sentence, Judge Gilmore ordered his immediate release. He refused, however, to credit the extra time Johnson served in prison toward his three-year term of supervised release.

On appeal, Johnson argues that his term of supervised release should be deemed to have commenced on the date on which he was entitled to be released in light of *Bailey*. The relevant statute provides that a person's "term of supervised release commences on the day the



person is released from imprisonment," and that a "term of supervised release does not run during any period in which the person is imprisoned in connection with a conviction for a Federal, State, or local crime." 18 U.S.C. § 3624(e). Another portion of the statute states that a "prisoner shall be released by the Bureau of Prisons on the date of the expiration of the prisoner's term of imprisonment." 18 U.S.C. § 3624(a). Relying on the language of § 3624(a), Johnson contends that we should consider "the day he [was] released from imprisonment" for purposes of § 3624(e) to be the date he was entitled to be released under *Bailey*'s interpretation of § 924(c) and the resulting revised sentence.

Our Court has not yet addressed the question raised by Johnson's appeal, but several other courts have considered the issue. In *United States v. Blake*, 88 F.3d 824 (9th Cir. 1996), the Ninth Circuit held that the defendants' terms of supervised release commenced on the day they should have been released from prison pursuant to the retroactive application of a clarifying amendment to the Sentencing Guidelines, and not on the date of their actual release. Based on the language of § 3624(a) and on the "obvious purpose of leniency in applying the revised sentencing guidelines retroactively," the *Blake* Court read the statute as "setting the date of release, and consequently the commencement of a supervised release term, at the time a prisoner's term expires." *Id.* at 825. The First and Eighth Circuits have adopted a contrary approach. Relying on the language of § 3624(e) and on the different purposes of imprisonment and supervised release, they have held that supervised release commences on the date the offender is actually released from prison. *See United States v. Joseph*, 109 F.3d 34 (1st Cir. 1997);

*United States v. Douglas*, 88 F.3d 533 (8th Cir. 1996) (per curiam).

In this case, we decline to follow the position advocated by the government and adopted by the First and Eighth Circuits in *Joseph* and *Douglas*. Read in isolation, the text of § 3624(e) appears to undercut Johnson's argument that he should receive credit for the extra time he spent in prison. However, the language of § 3624(e) must be considered in the context of the entire provision rather than in isolation. *United States v. Brown*, 536 F.2d 117,121 (6th Cir. 1976)("[I]t is fundamental that a section of a statute should not be read in isolation from the context of the whole statute.") (internal quotation marks and brackets omitted); *see also Third National Bank v. Impac Ltd., Inc.*, 432 U.S. 312, 320-21 (1977), 97 S. Ct. 2307, 58 L. Ed. 2d 368. Reading § 3624(e) out of context would be particularly inappropriate in this case because it is clear that Congress did not consider the effect of the retroactive invalidation of sentences when it drafted the statute. Section 3624(a), which requires that a prisoner "be released by the Bureau of Prisons on the date of the expiration of the prisoner's term of imprisonment," embodies Congress's intent that a prisoner not be held in prison following the expiration of a valid prison term. Johnson was not released from prison until two and a half years after the valid portion of his prison term expired. In light of the policy underlying subsection (a), we hold that Johnson was not "imprisoned in connection with a conviction for a Federal . . . crime" during these two and a half years because the conviction for which he was being held was invalid. Likewise, we conclude that the date of his "release" for purposes of the § 3624(a) was the



date he was entitled to be released rather than the day he walked out the prison door.

The government maintains that while imprisonment serves primarily to punish and incapacitate the offender, "supervised release is intended to facilitate 'the integration of the violator into the community, while providing the supervision designed to limit further criminal conduct.'" *Joseph*, 109 F.3d at 38-39 (quoting U.S.S.G. Ch. 7, Pt. A4, p.s.). In light of these distinct purposes, it contends that there is no basis for crediting the extra time Johnson spent in prison toward his supervised release term. We agree that rehabilitation is a primary purpose of supervised release, but supervised release is also punitive in nature. *See* S. Rep. No. 98-225, 98th Cong., 2d Sess., *reprinted in* 1984 U.S.C.C.A.N. 3182, 3306-08 (discussing purposes of supervised release); *United States v. Gilchrist*, 130 F.3d 1131, 1134 (3d Cir. 1997) ("Supervised release is punishment; it is a deprivation of some portion of one's liberty imposed as a punitive measure for a bad act."), *cert. denied*, __ U.S. __, 118 S. Ct. 1307, 140 L.Ed. 2d 472 (1998). Indeed, we doubt that Johnson would have brought this appeal otherwise.

The government also contends that Johnson's claim is more appropriately directed to the District Court pursuant to 18 U.S.C. § 3583(e), which authorizes the sentencing court to "terminate a term of supervised release and discharge the defendant released at any time after the expiration of one year of supervised release . . . if it is satisfied that such action is warranted by the conduct of the defendant released and the interest of justice." *See United States v. Spinelle*, 41 F.3d 1056, 1060-61 (6th Cir. 1994) (statute requiring

district court to impose three-year term of supervised release did not deprive district court of separate authority under § 3583(e) to terminate supervised release after completion of one year). Under the circumstances, we decline to hold that § 3583(e) is the only avenue of relief available to Johnson. That provision would do him little good, since he might complete the remainder of his three-year term before the District Court considered such a motion.

For the reasons stated, we hold that Johnson's term of supervised release commenced at the end of the valid fifty-one month portion of his prison term. The judgment of the District Court denying Johnson's request for the termination of his term of supervised release is REVERSED.

GILMAN, Circuit Judge, dissenting.

The majority adopts the Ninth Circuit's approach in *United States v. Blake*, 88 F.3d 824 (9th Cir. 1996), holding that a prisoner's term of supervised release should be reduced to account for any excess time served in prison. Because I believe that such an approach is contrary to both the plain language and the purpose of 18 U.S.C. § 3624(e), I dissent. *See United States v. Joseph*, 109 F.3d 34, 38-39 (1st Cir. 1997), and *United States v. Douglas*, 88 F.3d 533, 534 (8th Cir. 1996); *see also* S. Rep. No. 98-225, 98th Cong., 2d Sess., *reprinted in* 1984 U.S.C.C.A.N. 3182, 3306-08 (discussing purposes of supervised release).

The statute clearly states that a person's "term of supervised release commences on the day the person is released from imprisonment," and that "[a] term of supervised release does not run during any period in



which the person is imprisoned in connection with a conviction." 18 U.S.C. § 3624(e). The majority states that this language must be read in light of the language in § 3624(a) that "[a] prisoner shall be released by the Bureau of Prisons on the date of the expiration of the prisoner's term of imprisonment." The majority concludes that this language alters subsection (e) to mean that a prisoner begins his term of supervised release on the date he *was* released from custody or *should have been released* from custody, whichever first occurs. This approach is inconsistent with the language of subsection (e), which is clear and unconditional in its requirements. The majority is thus attempting to fashion an equitable remedy for a perceived injustice.

Giving Johnson credit toward his term of supervised release for the excess time in prison, however, does not satisfy the purpose of the statute. Although Congress did not provide for the situation presented in this case, it is clear that the purpose of supervised release is to "facilitate 'the integration of the violator into the community, while providing the supervision designed to limit further criminal conduct.'" *Joseph*, 109 F.3d at 38-39 (quoting U.S.S.G. Ch. 7, Pt. A, cmt. 4, and refusing to "invent some form of automatic credit or reduction . . . to compensate for . . . increased incarceration."). In contrast, imprisonment serves primarily to punish and incapacitate offenders. *Id.* at 39. Nonetheless, the majority holds that we may properly adjust the supervised release term to account for the extra time Johnson served in prison because "supervised release is also punitive in nature."

The terms of supervised release may indeed be fairly restrictive. In my opinion, however, that fact should

not cause this court to simply trade-off between a term of imprisonment and a term of supervised release. The fallacy of such reasoning is that a prisoner is not being reintegrated into society while still incarcerated. In an effort to do equity, the majority may be causing more harm than good by announcing a rule of law that excuses a prisoner under the circumstances of this case from participating in a program of supervised reintegration into society.

While Johnson's case is compelling (he served two and one-half years in prison on a sentence that was later revoked), it should be noted that his sentence was not imposed erroneously at the time of sentencing. Rather, his sentence was revoked by a retroactively applied interpretation of the applicable statute by the Supreme Court in *Bailey v. United States*, 516 U.S. 137, 116 S. Ct. 501, 133 L. Ed. 2d 472 (1995). Under such circumstances, I believe that a more appropriate avenue for relief is an application to the district court under 18 U.S.C. § 3583(e). This statute authorizes the sentencing court to cancel a term of supervised release after it has been in effect for one year when "such action is warranted by the conduct of the defendant released and the interest of justice." *See United States v. Spinelle*, 41 F.3d 1056, 1060-61 (6th Cir. 1994) (holding that a statute requiring a three-year term of supervised release did not eviscerate the district court's discretion to adjust the term of supervised release pursuant to § 3583(e)).

Because I believe that the majority's approach is inconsistent with the purpose as well as the unconditional language of 18 U.S.C. § 3624(e), I respectfully dissent.



**APPENDIX B**

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

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Civil No. 96-71222
Related to Crim. No. 89-80093

ROY LEE JOHNSON, PETITIONER

*v.*

UNITED STATES OF AMERICA, RESPONDENT

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ORDER DENYING PETITIONER'S MOTION TO VACATE, SET ASIDE OR CORRECT SENTENCE

Before the Court is petitioner ROY LEE JOHNSON's motion to vacate, set aside or correct his sentence and conviction, filed pursuant to 28 U.S.C. § 2255. Petitioner also filed a motion for bond pending post conviction relief on March 19, 1996; a motion for summary judgment on June 6, 1996; and a motion to vacate supervised release term on June 7, 1996. For the reasons discussed below, the motions are denied.

I.

This case has a complex procedural history. Petitioner was first charged in an information filed on March 12, 1990, by the United States Attorney. That information charged petitioner with one count of possession of a firearm by a felon, in violation of 19 U.S.C. § 922(g), and two counts of possession of narcotics, in

violation of 21 U.S.C. § 844. On April 19, 1990, petitioner pled guilty to this information pursuant to a Rule 11 plea agreement. However, on June 7, 1990, the Government filed a five-count superseding indictment. Count 1 charged him with possessing cocaine with intent to distribute, in violation of 21 U.S.C. § 841(a)(1); Count 2 charged him with the use of firearms in relation to the drug trafficking crime set forth in Count 1, in violation of 18 U.S.C. § 924(c); Count 3 charged him with possession with intent to distribute Dilaudid, in violation of 21 U.S.C. § 841(a)(1); Count 4 charged him with a second violation of 18 U.S.C. § 924(c), using the same firearms in relation to the drug trafficking crime charged in Count 3; and Count 5 charged him as a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1). On June 13, 1990, the Government moved to withdraw from the Rule 11 plea agreement, and after a hearing on the motion on July 19, 1990, this Court granted the government's motion, vacated the plea agreement, and set the matter on for trial.

Trial began in September, 1990. However, on September 26, 1980, a mistrial was declared because the jury was split 11 to 1 in favor of conviction, and could not reach a unanimous verdict. A new trial began on November 19, 1990, and on November 27, 1990, petitioner was convicted on all five counts of the superseding indictment.

On January 25, 1991, petitioner was sentenced to 51 months on Counts 1, 3 and 5, and was also sentenced to two consecutive 5 year terms of imprisonment on the § 924(c) counts, for a total of 171 months incarceration. Represented by new counsel, petitioner appealed his



conviction to the Sixth Circuit, setting forth the following claims of error:

I. That the Government waived its right to withdraw from the plea agreement;

II. That he was denied ineffective [*sic*] assistance of counsel by the Court's failure to allow him substitute counsel at sentencing;

III. That he was denied ineffective [*sic*] assistance of counsel when counsel failed to file pre-trial and other motions;

IV. That his conviction under 18 U.S.C. § 922(g) was improper; and

V. That his convictions under 18 U.S.C. § 924(c) violated double jeopardy.

Initially, the Sixth Circuit affirmed the conviction in all respects. *See United States v. Johnson*, 986 F.2d 134 (6th Cir. 1993). However, an *en banc* panel of the Court reversed on the double jeopardy claim, holding that this Court erred in imposing consecutive sentences on the § 924(c) counts. *United States v. Johnson*, 25 F.3d 1335 (6th Cir. 1994). On August 30, 1994, this Court resentenced petitioner pursuant to the instructions of the Sixth Circuit, reimposing a sentence of 60 months on the § 924(c) charges.

On March 20, 1996, petitioner filed a motion to vacate his sentence and conviction pursuant to 28 U.S.C. § 2255, setting forth the following claims of error:

1. That his § 924(c) convictions should be vacated pursuant to *Bailey v. United States*, 116 S. Ct. 501 (1995);

2. That he received ineffective assistance of counsel at voir dire, creating a violation of *Batson v. Kentucky*, 476 U.S. 79 (1986);

3. That Counsel was ineffective for failing to move for suppression of the evidence;

4. That the Court violated his due process rights at sentencing by failing to ensure that he received effective assistance of counsel; and

5. That he is entitled to an evidentiary hearing on these matters.

In addition to this motion to vacate his sentence, petitioner also filed a motion for bond pending post-conviction relief.

After reviewing petitioner's § 2255 motion and motion for bond, the Court ordered the Government to respond, and set the bond motion on for hearing. At that hearing, the Court ordered that petitioner's § 924(c) conviction (Count 4) be vacated, based on the Government's representation that it did not contest petitioner's arguments under *Bailey*. Pursuant to that order, petitioner was released from custody and placed on a three-year term of supervised release pursuant to the sentence imposed on Counts 1, 3, and 5. The Government stated its intention to file a response opposing the remainder of petitioner's § 2255 motion, and the court stated that it would rule on the remainder of petitioner's motion at a later date.



II.

Having received a response from the government on the remainder of petitioner's § 2255 motion, the Court must now consider these claims.[1]

Petitioner's first claim alleges that his trial counsel was deficient and violated his due process rights by purposely exluding black members of the jury in violation of *Batson v. Kentucky*, 476 U.S. 79 (1986). In support of this claim, petitioner has submitted a declaration stating that his trial counsel informed him that he would exclude all black males from the jury because the Assistant United States Attorney prosecuting the case wanted it that way. Petitioner made this claim briefly at his initial sentencing, but the Court informed him that it was not an appropriate matter for sentencing and that he would have to raise it on a motion for new trial. Petitioner did not file any post-trial motions, and did not raise the issue on appeal.

It is well established that a § 2255 motion shall not serve as a substitute for a direct appeal, and that a claim under § 2255 is procedurally barred unless the petitioner can justify his failure to present it at the time of sentencing or direct appeal. *United States v. Timmreck*, 441 U.S. 780, 784 (1979). Issues not raised on direct appeal will not be entertained in a § 2255 proceeding unless the petitioner demonstrates cause for his previous omission and prejudice resulting therefrom. *United States v. Frady*, 456 U.S. 152, 166-68 (1982).

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[1] Although the government's June 12, 1996 response was untimely filed, the Court accepted it pursuant to Fed. R. Civ. P. 6(b).

In this case, petitioner offers no justification for his failure to present his *Batson* claim on direct appeal, or in a post-trial motion, as suggested by the Court at sentencing. Although petitioner frames his *Batson* argument as an ineffective assistance of counsel claim, which are generally more properly brought in § 2255 motions than on direct appeal, petitioner was represented by different counsel on appeal than at trial, and certainly could have raised this *Batson* argument previously. Because petitioner could have raised this issue on direct appeal, and as provided no justification for this failure to do so, he is procedurally barred from raising the issue in this § 2255 motion.

Petitioner's next claims are that this counsel was ineffective in failing to file a pre-trial motion to suppress evidence and that his due process rights were violated because he did not have an adequate opportunity to object to the presentence report. Both of these claims of error were raised by petitioner on direct appeal and were rejected by the Sixth Circuit. Absent a change in circumstances, claims which were rejected on a direct criminal appeal are precluded from being reviewed again in collateral proceedings under 28 U.S.C. § 2255. *See United States* v. *Shabazz*, 657 F.2d 189 (8th Cir. 1981); *United States v. Orejuela*, 639 F.2d 1055 (3rd Cir. 1981); *Stephan v. United States*, 496 F.2d 527 (6th Cir. 1974), *cert. denied*, 423 U.S. 861 (1975). In this case, petitioner has shown no change of circumstances compelling this court to review these claims again. Moreover, any new variations on these arguments set forth in this motion should have been raised on appeal. Accordingly, petitioner is precluded from having these claims addressed in this § 2255 motion.



The final issue before the Court is petitioner's motion to vacate supervised release term filed by petitioner on June 7, 1996, *after* this Court vacated his § 924(c) conviction and released him from custody. In that motion, petitioner argues that the Court should end his supervised release because petitioner served extra time in custody under the Sixth Circuit's former, erroneous interpretation of § 924(c). For the following reasons, petitioner's motion is DENIED.

Under 18 U.S.C. § 3624, a person's

> term of supervised release commences on the day the person is released from imrpisonment. . . . A term of supervised release does not run during any period in which the person is imprisoned in connection with a conviction for a Federal, State or local crime. . . .

18 U.S.C. § 3624(e) (1994). This Court notes that supervised release and imprisonment fulfill distinct purposes. The purpose of supervised release is to aid the defendant's transition from incarceration to life in the community. Moreover, unlike prison, supervised release is not intended to punish or incapacitate the defendant. S. Rep. No. 225, 98th Cong., 2d Sess. 123-35 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3306-08.

The statute further provides:

> [a] prisoner shall be released by the Bureau of Prisons on the date of the expiration of the prisoner's term of imprisonment.

§ 3624(e). Thus, § 3624(e) and (a) read in conjunction provide that supervised release does not begin until the

person has been released from prison and does not run while the person is in prison. *See United States v. Douglas*, 88 F.3d 533 (8th Cir. 1996). Therefore, any argument suggesting that petitioner's time served counts towards his supervised release term is rejected. *Quinones v. United States*, 936 F. Supp. 153 (S.D.N.Y. 1996) (petitioners' argument that term of supervised release began when sentence for heroin conviction expired as opposed to when time for conviction under § 924(c) expired rejected; however, six-year term of supervised release reduced to three-year statutory minimum).

The Court is cognizant that petitioner served time for conviction on a § 924(c) count which has since been vacated; however, Petitioner's prison term cannot be undone. Most importantly, the purpose of supervised release has not been satisfied, and petitioner's term constitutes the mandatory minimum. Given that three years is the mandatory minimum of a supervised release term and considering the purposes of supervised release which have yet to be fulfilled, petitioner's motion to vacate the term of supervised release is DENIED.

III.

Based on the foregoing analysis, petitioner's motions are resolved as follows:

(1) the § 2255 motion is DENIED;

(2) the motion for summary judgment is DENIED; and



(3) the motion to vacate supervised release is DENIED.

IT IS SO ORDERED.

/s/ HORACE W. GILMORE
HORACE W. GILMORE
United States District Judge

Dated: Jan. 22, 1997
Detroit, Michigan

**APPENDIX C**

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

97-1151

ROY LEE JOHNSON, PETITIONER-APPELLANT

*v.*

UNITED STATES OF AMERICA, RESPONDENT-APPELLEE

[Filed: Jan. 21, 1999]

**ORDER**

BEFORE: MERRITT, KENNEDY, and GILMAN, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and less than a majority of the judges having favored the suggestion, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied. Judge Gilman would grant rehearing for the reasons stated in his dissent.

ENTERED BY ORDER OF THE COURT

/s/ LEONARD GREEN
LEONARD GREEN
Clerk



**APPENDIX D**

STATUTORY PROVISIONS INVOLVED

Section 3583 of Title 18 of the United States Code provides as follows:

**Inclusion of a term of supervised release after imprisonment**

**(a) In general.**—The court, in imposing a sentence to a term of imprisonment for a felony or a misdemeanor, may include as a part of the sentence a requirement that the defendant be placed on a term of supervised release after imprisonment, except that the court shall include as a part of the sentence a requirement that the defendant be placed on a term of supervised release if such a term is required by statute or if the defendant has been convicted for the first time of a domestic violence crime as defined in section 3561(b).

**(b) Authorized terms of supervised release.**—Except as otherwise provided, the authorized terms of supervised release are—

(1) for a Class A or Class B felony, not more than five years;

(2) for a Class C or Class D felony, not more than three years; and

(3) for a Class E felony, or for a misdemeanor (other than a petty offense), not more than one year.

**(c) Factors to be considered in including a term of supervised release.**—The court, in determining whether to include a term of supervised release, and, if a term of supervised release is to be included, in

determining the length of the term and the conditions of supervised release, shall consider the factors set forth in section 3553(a)(1), (a)(2)(B), (a)(2)(C), (a)(2)(D), (a)(4), (a)(5), and (a)(6).

**(d) Conditions of supervised release.**—The court shall order, as an explicit condition of supervised release, that the defendant not commit another Federal, State, or local crime during the term of supervision and that the defendant not unlawfully possess a controlled substance. The court shall order as an explicit condition of supervised release for a defendant convicted for the first time of a domestic violence crime as defined in section 3561(b) that the defendant attend a public, private, or private nonprofit offender rehabilitation program that has been approved by the court, in consultation with a State Coalition Against Domestic Violence or other appropriate experts, if an approved program is readily available within a 50-mile radius of the legal residence of the defendant. The court shall order, as an explicit condition of supervised release for a person described in section 4042(c)(4), that the person report the address where the person will reside and any subsequent change of residence to the probation officer responsible for supervision, and that the person register in any State where the person resides, is employed, carries on a vocation, or is a student (as such terms are defined under section 170101(a)(3) of the Violent Crime Control and Law Enforcement Act of 1994). The court shall also order, as an explicit condition of supervised release, that the defendant refrain from any unlawful use of a controlled substance and submit to a drug test within 15 days of release on supervised release and at least 2 periodic drug tests thereafter (as determined by the court) for use of a controlled substance. The condi-



tion stated in the preceding sentence may be ameliorated or suspended by the court as provided in section 3563(a)(4). The results of a drug test administered in accordance with the preceding subsection shall be subject to confirmation only if the results are positive, the defendant is subject to possible imprisonment for such failure, and either the defendant denies the accuracy of such test or there is some other reason to question the results of the test. A drug test confirmation shall be a urine drug test confirmed using gas chromatography/mass spectrometry techniques or such test as the Director of the Administrative Office of the United States Courts after consultation with the Secretary of Health and Human Services may determine to be of equivalent accuracy. The court shall consider whether the availability of appropriate substance abuse treatment programs, or an individual's current or past participation in such programs, warrants an exception in accordance with United States Sentencing Commission guidelines from the rule of section 3583(g) when considering any action against a defendant who fails a drug test. The court may order, as a further condition of supervised release, to the extent that such condition—

(1) is reasonably related to the factors set forth in section 3553(a)(1), (a)(2)(B), (a)(2)(C), and (a)(2)(D);

(2) involves no greater deprivation of liberty than is reasonably necessary for the purposes set forth in section 3553(a)(2)(B), (a)(2)(C), and (a)(2)(D); and

(3) is consistent with any pertinent policy statements issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a);

any condition set forth as a discretionary condition of probation in section 3563(b)(1) through (b)(10) and (b)(12) through (b)(20), and any other condition it considers to be appropriate. If an alien defendant is subject to deportation, the court may provide, as a condition of supervised release, that he be deported and remain outside the United States, and may order that he be delivered to a duly authorized immigration official for such deportation.

**(e) Modification of conditions or revocation.**—The court may, after considering the factors set forth in section 3553(a)(1), (a)(2)(B), (a)(2)(C), (a)(2)(D), (a)(4), (a)(5), and (a)(6)—

**(1)** terminate a term of supervised release and discharge the defendant released at any time after the expiration of one year of supervised release, pursuant to the provisions of the Federal Rules of Criminal Procedure relating to the modification of probation, if it is satisfied that such action is warranted by the conduct of the defendant released and the interest of justice;

**(2)** extend a term of supervised release if less than the maximum authorized term was previously imposed, and may modify, reduce, or enlarge the conditions of supervised release, at any time prior to the expiration or termination of the term of supervised release, pursuant to the provisions of the Federal Rules of Criminal Procedure relating to the modification of probation and the provisions applicable to the initial setting of the terms and conditions of post-release supervision;



(3) revoke a term of supervised release, and require the defendant to serve in prison all or part of the term of supervised release authorized by statute for the offense that resulted in such term of supervised release without credit for time previously served on postrelease supervision, if the court, pursuant to the Federal Rules of Criminal Procedure applicable to revocation of probation or supervised release, finds by a preponderance of the evidence that the defendant violated a condition of supervised release, except that a defendant whose term is revoked under this paragraph may not be required to serve more than 5 years in prison if the offense that resulted in the term of supervised release is a class A felony, more than 3 years in prison if such offense is a class B felony, more than 2 years in prison if such offense is a class C or D felony, or more than one year in any other case; or

(4) order the defendant to remain at his place of residence during nonworking hours and, if the court so directs, to have compliance monitored by telephone or electronic signaling devices, except that an order under this paragraph may be imposed only as an alternative to incarceration.

**(f) Written statement of conditions.**—The court shall direct that the probation officer provide the defendant with a written statement that sets forth all the conditions to which the term of supervised release is subject, and that is sufficiently clear and specific to serve as a guide for the defendant's conduct and for such supervision as is required.

**(g) Mandatory revocation for possession of controlled substance or firearm or for refusal to comply with drug testing.**—If the defendant—

(1) possesses a controlled substance in violation of the condition set forth in subsection (d);

(2) possesses a firearm, as such term is defined in section 921 of this title, in violation of Federal law, or otherwise violates a condition of supervised release prohibiting the defendant from possessing a firearm; or

(3) refuses to comply with drug testing imposed as a condition of supervised release;

the court shall revoke the term of supervised release and require the defendant to serve a term of imprisonment not to exceed the maximum term of imprisonment authorized under subsection (e)(3).

**(h) Supervised release following revocation.**—When a term of supervised release is revoked and the defendant is required to serve a term of imprisonment that is less than the maximum term of imprisonment authorized under subsection (e)(3), the court may include a requirement that the defendant be placed on a term of supervised release after imprisonment. The length of such a term of supervised release shall not exceed the term of supervised release authorized by statute for the offense that resulted in the original term of supervised release, less any term of imprisonment that was imposed upon revocation of supervised release.

**(i) Delayed revocation.**—The power of the court to revoke a term of supervised release for violation of a condition of supervised release, and to order the



defendant to serve a term of imprisonment and, subject to the limitations in subsection (h), a further term of supervised release, extends beyond the expiration of the term of supervised release for any period reasonably necessary for the adjudication of matters arising before its expiration if, before its expiration, a warrant or summons has been issued on the basis of an allegation of such a violation.

* * * * *

Section 3624 of Title 18 of the United States Code provides, in pertinent part, as follows:

**Release of a prisoner**

**(a) Date of release.**—A prisoner shall be released by the Bureau of Prisons on the date of the expiration of the prisoner's term of imprisonment, less any time credited toward the service of the prisoner's sentence as provided in subsection (b). If the date for a prisoner's release falls on a Saturday, a Sunday, or a legal holiday at the place of confinement, the prisoner may be released by the Bureau on the last preceding weekday.

* * * * *

**(e) Supervision after release.**—A prisoner whose sentence includes a term of supervised release after imprisonment shall be released by the Bureau of Prisons to the supervision of a probation officer who shall, during the term imposed, supervise the person released to the degree warranted by the conditions specified by the sentencing court. The term of supervised release commences on the day the person is released from imprisonment and runs concurrently with any Federal, State, or local term of probation or super-

vised release or parole for another offense to which the person is subject or becomes subject during the term of supervised release. A term of supervised release does not run during any period in which the person is imprisoned in connection with a conviction for a Federal, State, or local crime unless the imprisonment is for a period of less than 30 consecutive days. No prisoner shall be released on supervision unless such prisoner agrees to adhere to an installment schedule, not to exceed two years except in special circumstances, to pay for any fine imposed for the offense committed by such prisoner.

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SUPREME COURT, U.S

(2)

No. 98-1696

in the

# Supreme Court

of the

# United States

October Term 1998

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UNITED STATES OF AMERICA,

*Petitioner,*

*vs.*

ROY LEE JOHNSON

*Respondent.*

---

**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT**

---

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**ADOPTION**

The Respondent agrees with the accuracy of Petitioner's Question Presented, Opinions, Below, Statutory Provisions, Jurisdictional statement, and Statement of Case, and adopts those as his own.

**ARGUMENT**

**1. The Court of Appeals opinion was a correct interpretation of 18 U.S.C.§ 3583**

The Respondent submits that the Sixth and Ninth Circuits are correct in their determination that a defendant is entitled to credit for time spent wrongfully incarcerated against supervised release.

The Sixth Circuit, in determining this appeal, specifically found that 18 U.S.C. § 3624(a) requires that a defendant be released from the Bureau of Prisons on the date of the expiration of the prisoner's term of imprisonment. The Court reasoned that, in situations like that of the Respondent, this statute could not be given full effect, as the Respondent served 2 and ½ years in prison longer than he should have under the law. The United States took 2 ½ years of the Respondents freedom under an erroneous interpretation of 18 U.S.C. §



924(c). Therefore, to put § 3624(a) to some effect, adjustment of the term of supervised release was warranted.

The Ninth Circuit similarly held, in *United States v. Blake*, 88 F.3d 824 (9th C. 1996), that in order to give § 3624(a) effect when faced with a situation where a defendant has served in excess of his required sentence, credit should be given against supervised release term. The court found that fairness, as well as the rule of lenity, required such a result. *Id.* at 825

Petitioner argues that the plain language of 18 U.S.C. § 3583(e) requires the holding that a defendant may not obtain credit against his supervised release term for time spent incarcerated erroneously. Although it is true that 3583(e) states that supervised release begins on the defendant's release from prison, it is also true that Congress failed to consider the effect of wrongful imprisonment. As the Sixth Circuit stated "it is clear that

Congress did not consider the effect of retroactive application of sentences when it drafted [18 U.S.C. § 3583]." *(Petitioner's Appendix 4a)* Congress' failure to consider this scenario creates ambiguity in the statute, an ambiguity which must be resolved in favor of the Respondent. As this Court found in *United States v. Bass*, 404 U.S. 336, 92 S.Ct. 515 (1971), "where there is ambiguity in a criminal statute, doubts are resolved in favor of the defendant." 404 U.S. at 348

Further, the literal reading of a particular term of a statute, to the exclusion of the balance of the statute, has never been recommended by this Court. As this Court has stated "The decisions of this Court have repeatedly warned against the dangers of an approach to statutory construction which confined itself to the bare words of the statute [cite omit], for literalness may strangle meaning." *Lynch v. Overholser*, 369 U.S. 705, — , 82 S.Ct.



1063,1067 (1962)

A literal reading of 18 U.S.C. § 3583(e), to the exclusion of the rest of the statute, would create a result not warranted. Congress did intend that the Bureau of Prisons not hold a defendant longer than his lawful sentence. *18 U.S.C. § 3624(a)* The only way to give some effect to that imperative, under these particular circumstances, is to credit supervised release.

The Petitioner also ignores the fact that, although supervised release and imprisonment do have some divergent goals, they both still carry punishment as an overriding factor. As such, giving credit against a term of supervised release on account of extra time served incarcerated is equitable.

This Court has consistently held that "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." *Bass* at 92 S.Ct. 522 The Sixth

Circuit, recognizing the ambiguity in Title 18 with regards to this issue, resolved the issue in favor of the Respondent. This determination should be upheld, and no writ should issue.



**CONCLUSION**

The Respondent requests that this Court uphold the finding of the Court of Appeals, and deny the petition for writ of certiorari.

Respectfully submitted,

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No. 98-1696

# In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

*v.*

ROY LEE JOHNSON

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT*

## REPLY BRIEF FOR THE PETITIONER

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# In the Supreme Court of the United States

No. 98-1696

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## REPLY BRIEF FOR THE PETITIONER

The United States seeks the Court's review to resolve a circuit conflict over whether a term of supervised release begins on the date of a federal prisoner's actual release from prison or on the earlier date on which he should have been released in accordance with a retroactively applied interpretation of the law. The Sixth Circuit, consistent with the Ninth Circuit, concluded that the date of a prisoner's release from prison under federal law is the date on which "he was entitled to be released rather than the day he walked out the prison door." Pet. App. 5a. The effect is to credit any excess time that the prisoner served in prison against the time that he is to serve on supervised release. The First, Fifth, and Eighth Circuits have reached the contrary conclusion. See Pet. 6-8 (citing cases).

Respondent does not dispute that the question presented in the petition is an important and recurring one

that has divided the courts of appeals. Nor does respondent identify any reason why this is not an appropriate case in which to resolve that question definitively. Respondent argues only that the decision below is correct on the merits. Even if true, that would be no reason to withhold review of a question of such significance to the federal criminal justice system. In any event, respondent's defense of the decision below is unavailing.

1. Respondent acknowledges (Br. in Opp. 3) that Congress has expressly provided that "supervised release begins on the defendant's release from prison." See 18 U.S.C. 3624(e) ("The term of supervised release commences on the day the person is released from imprisonment * * * . A term of supervised release does not run during any period in which the person is imprisoned in connection with a conviction for a Federal, State, or local crime unless the imprisonment is for a period of less than 30 consecutive days.").[1] Respondent nonetheless argues (Br. in Opp. 4) that this clear, straightforward, and unequivocal statutory text is "ambiguous," and thus that the rule of lenity should apply, because Congress "fail[ed] to consider this scenario [*i.e.*, a vacated sentence]" when enacting supervised release. As this Court has recognized, however, "[t]he fact that [a criminal statute] has been applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth." *National Org. for Women, Inc.* v. *Scheidler*, 510 U.S. 249, 262 (1994) (quoting *Sedima, S.P.R.L.* v. *Imrex Co.*, 473 U.S. 479, 499 (1985)); see also *Beecham* v. *United States*, 511 U.S. 368, 374 (1994) (In deciding whether a statute is so ambiguous as to warrant the application of the rule of lenity, "our task is not the hopeless one of ascertaining what the legislators who passed the law would have decided had they reconvened to consider petitioners' particular cases. Rather, it is to determine whether the language the legislators actually enacted has a plain, unambiguous meaning.").

[1] Respondent mistakenly cites 18 U.S.C. 3583(e) for the quoted statement. Section 3583(e), as discussed subsequently in the text, provides a district court with authority, among other things, to terminate a term of supervised release after one year.



2. Respondent further contends (Br. in Opp. 5) that the supervised release provisions should not be given "[a] literal reading," but instead should be construed to mean that a defendant's term of supervised release may be deemed to have begun before his release from prison, because that is "[t]he only way to give some effect" to Congress's "inten[t] that the Bureau of Prisons not hold a defendant longer than his lawful sentence." The statute from which respondent discerns Congress's intent, 18 U.S.C. 3624(a), provides, in pertinent part, that "[a] prisoner shall be released by the Bureau of Prisons on the date of the expiration of the prisoner's term of imprisonment." It does not address the situation of a defendant, such as respondent, who was, in fact, "released by the Bureau of Prisons on the date of the expiration of [his] term of imprisonment," albeit on a later date than if the retroactively applied understanding of the law prevailed at the time of his original sentencing. Equally important, and contrary to respondent's assertion, Congress has already provided a remedy for defendants who serve excess time in prison: under 18 U.S.C. 3583(e)(1), after a defendant has served one year of supervised release, the district court may terminate the remainder of his supervised release term if "satisfied that such action is warranted by the conduct of the defendant released and the interest of

justice." A defendant's service of excess time in prison is a factor that a court may be consider in determining whether early termination of supervised release is "in the interest of justice." See Sentencing Guidelines § 1B1.10, Application Note 5. It is thus unnecessary to strain the text of 18 U.S.C. 3624(e), or any other statutory provision, to create a remedy for defendants such as respondent.

3. Finally, respondent argues (Br. in Opp. 5) that crediting a defendant's excess prison time against his supervised release time is "equitable" because, "although supervised release and imprisonment do have some divergent goals, they both still carry punishment as an overriding factor." But this Court does not create exceptions not warranted by the plain text of a statute, or by other tools of statutory construction, simply to achieve a result that is arguably more "equitable." See, *e.g.*, *Brogan* v. *United States*, 522 U.S. 398 (1998). As noted in the petition (at 11-13), moreover, Congress expressly stated that supervised release was *not* designed to serve "the sentencing purposes of incapacitation and punishment." S. Rep. No. 225, 98th Cong., 1st Sess. 124 (1983). Rather, Congress explained that "the primary goal of such a term [of supervised release] is to ease the defendant's transition into the community after the service of a long prison term for a particularly serious offense, or to provide rehabilitation to a defendant who has spent a fairly short period in prison for punishment or other purposes but still needs supervision and training programs after release." *Ibid.* Congress thus intended that incarceration and supervised release be distinct, rather than interchangeable, components of a defendant's sentence.



* * * * *

For the reasons stated above and in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted.

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(4)

No. 98-1696

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*ON WRIT OF CERTIORARI*
*TO THE UNITED STATES COURT OF APPEALS*
*FOR THE SIXTH CIRCUIT*

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## BRIEF FOR THE UNITED STATES

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## QUESTION PRESENTED

Whether a federal criminal defendant's term of supervised release commences on the date of his actual release from prison or on the earlier date on which he would have been released in accordance with a subsequent change in the law that is retroactively applied.

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## BRIEF FOR THE UNITED STATES

### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-8a) is reported at 154 F.3d 569. The opinion of the district court (Pet. App. 9a-17a) is unreported.

### JURISDICTION

The judgment of the court of appeals was entered on August 26, 1998. A petition for rehearing was denied on January 21, 1999 (Pet. App. 18a). The petition for a writ of certiorari was filed on April 21, 1999, and was granted on September 10, 1999. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

### STATUTORY PROVISIONS INVOLVED

The relevant provisions of Title 18 of the United States Code, Sections 3553(a), 3583, and 3624(a) and (e),

are reproduced in an appendix to this brief (App., *infra*, 1a-10a).

## STATEMENT

1. In the Comprehensive Crime Control Act of 1984, Congress adopted an array of sentencing reform provisions, which were designed to achieve greater consistency, coherence, and certainty in federal criminal sentencing. Pub. L. No. 98-473, Title II, 98 Stat. 1976; see S. Rep. No. 225, 98th Cong., 1st Sess. 37, 39 (1983). One of those reforms was supervised release.[1] Congress, for the first time, authorized the district courts, in sentencing a defendant to a term of imprisonment for any felony or misdemeanor, to "include as a part of the sentence a requirement that the defendant be placed on a term of supervised release after imprisonment." § 212(a)(2), 98 Stat. 1999 (18 U.S.C. 3583(a)).[2] Congress directed the district courts to consider, in determining the duration and conditions of any term of supervised release, "the nature and circumstances of the offense," "the history and characteristics of the defendant," "the need * * * to afford adequate deterrence to criminal conduct," and "the need * * * to provide the defendant with needed educational or vocational training medical care, or other correctional treatment."

[1] The same statute established the United States Sentencing Commission and the sentencing guidelines system. See, *e.g.*, § 217(a), 98 Stat. 2017-2019 (28 U.S.C. 991-994); § 212(a)(2), 98 Stat. 1989 (18 U.S.C. 3553).

[2] Congress has since amended Section 3583(a) to provide that the district courts must impose a term of supervised release if the statute under which the defendant was convicted so requires, see, *e.g.*, 21 U.S.C. 841(b), or if the defendant was convicted for the first time of a crime involving domestic violence.



§ 212(a)(2), 98 Stat. 1989-1999 (18 U.S.C. 3553(a), 3583(c) and (d)).

Congress has mandated that a term of supervised release be imposed for particular offenses, such as manufacturing, distributing, or possessing with the intent to manufacture or distribute controlled substances, in violation of 21 U.S.C. 841(a). See 21 U.S.C. 841(b)(1) and (2) (requiring minimum terms of supervised release ranging from one year to ten years depending upon the nature of the offense, the quantity of drugs involved, and the defendant's criminal history). The Sentencing Guidelines provide that the district courts also should impose a term of supervised release in any other case in which the defendant is sentenced to a term of imprisonment for more than one year. Sentencing Guidelines § 5D1.1(a), comment. (n.1) (noting circumstances in which a court may depart from that Guideline).

2. In 1990, after a jury trial in the United States District Court for the Eastern District of Michigan, respondent was convicted on five counts: two counts of possession of drugs with intent to distribute them, in violation of 21 U.S.C. 841(a); two counts of use of a firearm during and in relation to a drug trafficking offense, in violation of 18 U.S.C. 924(c); and one count of possession of a firearm after having previously been convicted of a felony, in violation of 18 U.S.C. 922(g). He was sentenced to a total of 171 months' imprisonment, consisting of three concurrent 51-month terms on the Section 841(a) and Section 922(g) counts, to be followed by two consecutive 60-month terms on the Section 924(c) counts. Pet. App. 1a-2a.

The district court also imposed a three-year term of supervised release, the minimum term mandated by Congress for a violation of Section 841(a) involving the

quantity of drugs attributable to respondent. See 21 U.S.C. 841(b)(1)(C). In addition to the standard conditions of supervised release set forth in Section 3583(d) and Sentencing Guidelines § 5D1.3, the court imposed two special conditions of supervised release on respondent: that he "not possess, receive, or transport any firearm or dangerous weapons" and that he "participate in a program approved by the United States Probation Office for treatment of narcotic addiction or drug dependency." Judgment 3 (Jan. 25, 1991).

The court of appeals, while otherwise affirming respondent's convictions and sentence, held that the district court erred in imposing consecutive terms of imprisonment on the two Section 924(c) counts. See 25 F.3d 1335 (6th Cir. 1994) (en banc). On remand, the district court vacated the sentence on one of the Section 924(c) counts, thereby reducing respondent's total term of imprisonment to 111 months. Judgment 2 (Aug. 30, 1994).

After this Court's decision in *Bailey* v. *United States*, 516 U.S. 137 (1995), respondent moved, pursuant to 28 U.S.C. 2255, to vacate his Section 924(c) convictions.[3] He contended that those convictions were predicated on a construction of Section 924(c) that was rejected by this Court in *Bailey*. The United States did not oppose the motion. The district court vacated the Section 924(c) convictions and, because respondent had served

[3] In *Bailey*, the Court held that, to establish "use" of a firearm under Section 924(c), "the Government must show active employment of the firearm," and not "mere possession." 516 U.S. at 144. The Sixth Circuit, consistent with the rule widely applied in the lower courts, had previously permitted conviction without a showing of "active" use. See, *e.g.*, *United States* v. *Acosta-Cazares*, 878 F.2d 945, 952 (6th Cir.), cert. denied, 493 U.S. 899 (1989).



more than the 51 months' imprisonment to which he had been sentenced on the remaining counts, ordered his immediate release from prison. Pet. App. 2a, 12a.

Respondent then moved to vacate the remainder of his three-year term of supervised release on the Section 841(a) counts. He argued that his term of supervised release should be reduced to account for the two and one-half years that he spent in prison as a result of the Sixth Circuit's erroneous interpretation of Section 924(c). The district court denied the motion. Pet. App. 15a-17a. The court relied on both the text and the purpose of the statutory provisions governing supervised release. The court explained that 18 U.S.C. 3624(e) provides that a "term of supervised release commences on the day the person is released from imprisonment" and "does not run during any period in which the person is imprisoned in connection with a conviction for a Federal, State or local crime." Pet. App. 15a (quoting 18 U.S.C. 3624(e)). The court also recognized that "supervised release and imprisonment fulfill distinct purposes," because supervised release, unlike imprisonment, is designed "to aid the defendant's transition from incarceration to life in the community." *Ibid.*

3. A divided panel of the Sixth Circuit reversed. The panel held that respondent's term of supervised release began on "the date he was entitled to be released" from prison under a sentence that excluded the subsequently vacated Section 924(c) convictions, "rather than the day he walked out the prison door." Pet. App. 4a-5a.

The panel acknowledged that the text of 18 U.S.C. 3624(e), if "[r]ead in isolation," would support the district court's position that a person's term of supervised release does not begin until he is actually released from prison. Pet. App. 4a. But the panel concluded that such

a reading would be inconsistent with 18 U.S.C. 3624(a), another section of the same statute, which states that "[a] prisoner shall be released by the Bureau of Prisons on the date of the expiration of [his] term of imprisonment." The panel viewed Section 3624(a) as "embod[ying] Congress's intent that a prisoner not be held in prison following the expiration of a valid prison term." Pet. App. 4a. "In light of th[at] policy," the panel held that respondent, whose Section 924(c) convictions were invalid, should not be considered to have been "imprisoned in connection with a conviction for a Federal * * * crime," within the meaning of Section 3624(e), during his final two and one-half years in prison. *Ibid.* (quoting 18 U.S.C. 3624(e)).

The panel rejected the argument that incarceration and supervised release serve distinct purposes and, accordingly, that prison time cannot be credited against time on supervised release. The panel, while acknowledging that supervised release is primarily designed to serve rehabilitative purposes, placed emphasis on the conclusion that supervised release "is also punitive in nature." Pet. App. 5a.

Judge Gilman dissented. He argued that reducing a defendant's term of supervised release to account for excess time served in prison "is contrary to both the plain language and the purpose of 18 U.S.C. § 3624(e)." Pet. App. 6a. He viewed the text of Section 3624(e) as "clear and unconditional in its requirements" that a term of supervised release begin only when "the person is released from imprisonment" and "not run during any period in which the person is imprisoned." *Id.* at 6a-7a (quoting 18 U.S.C. 3624(e)). He also observed that the purpose of supervised release—"to facilitate the integration of the violator into the community, while providing the supervision designed to limit further criminal conduct"—is not served until the violator is actually in the community. Pet. App. 7a (internal quotation marks and citation omitted). Finally, he pointed out that 18 U.S.C. 3583(e), which permits a district court to cut short a term of supervised release after one year if "warranted by the conduct of the defendant released and the interest of justice," provides a means for persons in respondent's position to be excused from a lengthy term of supervised release. Pet. App. 8a.



## SUMMARY OF ARGUMENT

Congress has provided that a term of supervised release begins on the date that a federal prisoner is "released from imprisonment," 18 U.S.C. 3624(e), and not on an earlier date that, in retrospect, represents the date on which he should have been released under a retroactively applied change in the law. That conclusion follows from the statutory text and structure. It also accords with Congress's purpose of providing a period of official supervision for a defendant who is making the transition from prison into society.

Congress has defined supervised release as a term of a defendant's sentence that is to run "after imprisonment," 18 U.S.C. 3583(a), not concurrently with imprisonment. Congress has further provided that a defendant's "term of supervised release commences on the day [he] is released from imprisonment" and "does not run during any period in which [he] is imprisoned [for more than 30 days] in connection with a conviction for a Federal, State, or local crime." 18 U.S.C. 3624(e). That clear statutory language means that a term of supervised release begins only on the date that the defendant is actually released from prison, not on the earlier date that the defendant would have been

released under a change in the law that had not yet been announced or applied to his case.

Congress's principal purpose in authorizing supervised release—"to ease the defendant's transition into the community," S. Rep. No. 225, 98th Cong., 1st Sess. 124 (1983)—would be frustrated if a defendant was automatically excused from all, or some portion, of his term of supervised release because his term of incarceration was reduced to less than time served. Such defendants, as a class, are not in any less need of supervision when they return to society than any other defendant. The additional time that the defendant spent in prison was, in retrospect, unwarranted, but that provides no per se assurance that his transition into the community will be any less problematic. As this Court has recognized in another context, community supervision (in that case, probation) and imprisonment "are not fungible," because they are "fundamentally different in character." *United States* v. *Granderson*, 511 U.S. 39, 46 (1994).

Congress has not left those in respondent's circumstances without any means of seeking relief from a lengthy term of supervised release. Under 18 U.S.C. 3583(e)(1), a district court may "terminate a term of supervised release and discharge the defendant released at any time after the expiration of one year of supervised release * * * if it is satisfied that such action is warranted by the conduct of the defendant released and the interest of justice." In exercising that authority, a district court may take into account that a defendant has served a period of incarceration for a subsequently overturned conviction. In addition, a district court may "reduce" or "modify" the particular conditions of a defendant's term of supervised release "at any time." 18 U.S.C. 3583(e)(2). Especially in view of



those alternative remedies, the court of appeals had no warrant to require that respondent's excess time in prison be credited against his time on supervised release.

## ARGUMENT

### A DEFENDANT'S TERM OF SUPERVISED RELEASE BEGINS ON THE DATE OF HIS ACTUAL RELEASE FROM PRISON, NOT ON AN EARLIER DATE ON WHICH HE SHOULD HAVE BEEN RELEASED UNDER A RETROACTIVELY APPLIED CHANGE IN THE LAW

A federal criminal defendant's term of supervised release does not commence until the date of his actual release from prison. It cannot be deemed to have commenced on any earlier date on which the defendant would have been released if a new judicial decision or other retroactively applied change in the law affecting his sentence had been announced before that date. A defendant thus is not entitled to credit the time that he spent in prison serving a sentence that was subsequently vacated against the time that he is still to spend on supervised release.

#### A. The Relevant Statutory Provisions Unambiguously Provide That A Term Of Supervised Release Begins Only When A Defendant Is Actually Released From Prison

Congress has spoken directly to the question presented in this case. In 18 U.S.C. 3624(e), a provision titled "Supervision after release," Congress stated that a "term of supervised release commences on the day the person is released from imprisonment" and "does not run during any period in which the person is

imprisoned in connection with a conviction for a Federal, State, or local crime."[4] See S. Rep. No. 225, 98th Cong., 1st Sess. 148 (1983) (noting that Section 3624(e) "specifies that the term [of supervised release] begins on the date of release" from prison). That language is clear, straightforward, and unambiguous. It cannot sensibly be construed to mean that a term of supervised release begins *either* on the date of a person's release from prison *or* on some earlier date on which the person would have been released under a change in the law that had not yet been announced. See *United States* v. *Joseph*, 109 F.3d 34, 38 (1st Cir. 1997) (recognizing that "the language in § 3624(e) must be given its plain and literal meaning," *i.e.*, that "a person's term of supervised release does not begin until the peson has been released from prison") (quoting *Quinones* v. *United States*, 936 F. Supp. 153, 155 (S.D.N.Y. 1996)).[5]

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[4] The statute contains a limited exception applicable where "the imprisonment is for a period of less than 30 consecutive days." 18 U.S.C. 3624(e).

[5] In addition to the First Circuit in *Joseph*, two other courts of appeals have held that a term of supervised release commences on the defendant's actual release date, not the date on which he should have been released under a revised sentence. See *United States* v. *Jeanes*, 150 F.3d 483, 485 (5th Cir. 1998); *United States* v. *Douglas*, 88 F.3d 533, 534 (8th Cir. 1996) (per curiam); see also *United States* v. *Jaramillo*, No. 98-2005, 1998 WL 536387 (10th Cir. Aug. 18, 1998) (unpublished disposition noted at 156 F.3d 1245), cert. denied, 119 S. Ct. 832 (1999). The Ninth Circuit, like the Sixth Circuit in this case, has held that a defendant's term of supervised release must be deemed to have commenced on the date that he should have been released from prison according to his revised sentence, not on the date that he was actually released after the revised sentence was imposed. See *United States* v. *Blake*, 88 F.3d 824, 825 (1996). The court in *Blake* reached that conclusion in the context of a sentence that was modified in light of a retroactively applied change in the Sentencing Guidelines. See 18 U.S.C. 3582(c)(2); Sentencing Guidelines § 1B1.10(b). The Sentencing Commission responded to *Blake* by prohibiting a reduction in a term of imprisonment to less than time served as a result of such a change in the Guidelines. The effect of that amendment is to prohibit a shortening of a term of supervised release in the circumstances involved in *Blake*. See pages 19-20, *infra*.



Other statutory provisions confirm that Congress intended that a term of supervised release would begin only when the defendant actually walked out the prison door. The provision authorizing the district courts to impose supervised release as part of a defendant's sentence, 18 U.S.C. 3583, is titled "Inclusion of a term of supervised release *after imprisonment*" (emphasis added). The initial sentence of that provision states that "[t]he court, in imposing a sentence to a term of imprisonment for a felony or a misdemeanor, may include as a part of the sentence a requirement that the defendant be placed on a term of supervised release *after imprisonment*." 18 U.S.C. 3583(a) (emphasis added).[6] The Senate Report on Section 3583 is in accord. See S. Rep. No. 225, *supra*, at 123 ("This section permits the court, in imposing a term of imprisonment for a felony or a misdemeanor, to include as part of the sentence a requirement that the defendant serve

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[6] Section 3583 is part of chapter 227 of the Criminal Code, titled "Sentences," and is primarily concerned with the district courts' role at the time of sentencing with respect to supervised release. Section 3624(e) is part of chapter 229 of the Criminal Code, titled "Postsentence Administration," and is concerned with the implementation of a sentencing term imposing supervised release. Both provisions contemplate that the term of supervised release begins after completion of the term of imprisonment.

a term of supervised release *after he has served the term of imprisonment.*") (emphasis added).

This Court has recognized that a term of supervised release is distinct from, and consecutive to, a term of incarceration. See *Granderson*, 511 U.S. at 50 (noting that "terms of supervised release * * * follow up prison terms"); *Gozlon-Peretz* v. *United States*, 498 U.S. 395, 407 (1991) ("[s]upervised release is a unique method of post-confinement supervision invented by the Congress"). So, too, has the United States Sentencing Commission, which is charged with "establish[ing] sentencing policies and practices for the Federal criminal justice system." 28 U.S.C. 991(b)(1). The Sentencing Commission has prescribed that district courts "shall order a term of supervised release *to follow imprisonment* when a sentence of imprisonment of more than one year is imposed, or when required by statute," and "may order a term of supervised release *to follow imprisonment* in any other case." Sentencing Guidelines § 5D1.1 (emphases added).

The ordinary meaning of the term "release" confirms that a term of supervised release does not run while the defendant is still in prison. The word "release" is an antonym of the words "detention" and "imprisonment." See William D. Lutz, *The Cambridge Thesaurus of American English* 387 (1994) (release/detention); *The Penguin Dictionary of English Synonyms and Antonyms* 344 (1992) (release/imprisonment); see also *Webster's Dictionary of Synonyms* 690 (1942) ("release" is an antonym of "[d]etain (as a prisoner)"). In accordance with common English usage, then, a defendant cannot be both imprisoned and released (even with supervision) at the same time. Cf. *Reno* v. *Koray*, 515 U.S. 50, 57 (1995) (contrasting "release" and "detention" under the bail reform provisions of the Comprehensive



Crime Control Act of 1984); *Hinckley* v. *United States*, 163 F.3d 647, 653 (D.C. Cir. 1999) (contrasting "release" and "confine" under a provision of the District of Columbia Code).

The court of appeals conceded (Pet. App. 4a) the force of the language of Section 3624(e), but found a counterweight in Section 3624(a), which states that "[a] prisoner shall be released by the Bureau of Prisons on the date of the expiration of [his] term of imprisonment." Contrary to the court of appeals' reasoning, Section 3624(a) does not speak to the issue here. It does not suggest that a defendant's term of imprisonment should be deemed to "expir[e]" on any date other than the one dictated by the sentence imposed by the district court. The court of appeals' construction of Section 3624(a) implies that the Bureau of Prisons must continually assess, with respect to each prisoner in the federal system, whether the prisoner is entitled to an early release as a result of a new judicial decision or other change in the law. But Congress has left such determinations to the district court that sentenced the prisoner. See 28 U.S.C. 2255; 18 U.S.C. 3582(c).[7]

Congress has explicitly provided in other circumstances for a defendant to receive a "credit" against his sentence. For example, a prisoner "may receive credit toward the service of [his] sentence" of up to 54 days a

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[7] The Senate Report confirms that Section 3624(a) was not intended to address the situation presented in this case. Section 3624(a) was instead designed to "replace[] a confusing array of statutes and administrative procedures concerning the determination of the date of release of a prisoner," which had, among other things, required the Bureau of Prisons and the Parole Commission to engage in duplicative recordkeeping and "constant evaluation of prisoner eligibility for release." S. Rep. No. 225, *supra*, at 144.

year if the Bureau of Prisons determines that he "has displayed exemplary compliance with institutional disciplinary regulations." 18 U.S.C. 3624(b) (1994 & Supp. III 1997); see also 18 U.S.C. 3585(b) (providing that "[a] defendant shall be given credit toward the service of a term of imprisonment" for certain "time he has spent in official detention prior to the date the sentence commences"). Such provisions demonstrate that, when Congress intends to allow a credit against a defendant's sentence, Congress does so expressly. Congress did not do so with respect to the terms of supervised release of defendants who served time in prison under a sentence that is subsequently vacated. It would thus be particularly unwarranted to construe Section 3624(a), or any other provision of the Criminal Code, as implicitly authorizing a credit for such defendants.

**B. Congress's Principal Purpose In Authorizing Supervised Release—"To Ease The Defendant's Transition Into The Community"—Would Be Undermined If A Defendant's Excess Prison Time Automatically Reduced His Time On Supervised Release**

The conclusion that a term of supervised release commences only when a defendant is actually released from prison accords with Congress's principal purpose in establishing supervised release as a distinct component of a defendant's sentence. The Senate Report explained that "the primary goal of such a term is to ease the defendant's transition into the community after the service of a long prison term for a particularly serious offense, or to provide rehabilitation to a defendant who has spent a fairly short period in prison for punishment or other purposes but still needs supervision and training programs after release." S. Rep. No. 225, *supra*, at 124. The Senate Report added that supervised release was not designed to serve "the sentencing purposes of incapacitation and punishment." *Ibid.*; see also *id.* at 125 ("The term of supervised release * * * follows a term of imprisonment and may not be imposed for purposes of punishment or incapacitation since those purposes will have been served to the extent necessary by the term of imprisonment."). Congress perceived that the goal of assisting a defendant's integration into the community was not adequately served under the existing parole system, because a defendant was subject to supervision only if he was released from prison early by the Parole Commission, but not if he remained incarcerated for the full term imposed by the district court. *Id.* at 122-124. Congress thus intended that "[t]he term of supervised release would be a separate part of the defendant's sentence, rather than being the end of the term of imprisonment," so that whether, and to what extent, a defendant would be subject to supervision would turn on the needs of the defendant and the community, rather than "on the almost sheer accident of the amount of time that happens to remain of the term of imprisonment when the defendant is released." *Id.* at 123, 124.



Congress's purposes for authorizing supervised release are further reflected in 18 U.S.C. 3583(c), which provides that a district court, in determining whether to impose a term of supervised release and the duration and conditions of any such term, shall consider certain of the "factors to be considered in imposing a sentence" enumerated in 18 U.S.C. 3553(a). Section 3583(c), as originally enacted in 1984, identified six of those factors: "the nature and circumstances of the offense and the history and characteristics of the defendant," 18 U.S.C. 3553(a)(1); "the need * * * to afford adequate deter-

rence to criminal conduct," 18 U.S.C. 3553(a)(2)(B); "the need * * * to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner," 18 U.S.C. 3553(a)(2)(D); "the kinds of sentences and the sentencing range established for * * * the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines issued by the Sentencing Commission," 18 U.S.C. 3553(a)(4); "any pertinent policy statements issued by the Sentencing Commission," 18 U.S.C. 3553(a)(5); and "the need to avoid unwarranted sentence disparities," 18 U.S.C. 3553(a)(6). § 212(a)(2), 98 Stat. 1989-1990, 1999. Congress amended 18 U.S.C. 3585(c) in 1987 to require district courts to consider a seventh factor in the supervised release determination: "the need * * * to protect the public from further crimes of the defendant," 18 U.S.C. 3553(a)(2)(C). Sentencing Act of 1987, Pub. L. No. 100-182, § 9, 101 Stat. 1267. Notably absent from the list of factors that Congress has deemed relevant to the supervised release determination is 18 U.S.C. 3553(a)(2)(A), "the need * * * to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense." See also Sentencing Guidelines § 5D1.1, comment. (n.1) (1998) (recognizing that the purposes of supervised release include "to protect the public welfare," "to provide drug or alcohol treatment or testing," and "to assist the reintegration of the defendant into the community").

Congress thus contemplated that supervised release would serve purposes distinct from incarceration. It would aid a defendant in making his "transition into the community" after his release from prison—for example, by assisting him in obtaining vocational training,



medical treatment, or substance abuse counseling. See 18 U.S.C. 3553(a)(2)(D); Sentencing Guidelines § 5D1.3 (enumerating mandatory and discretionary conditions of supervised release). It would at the same time provide a measure of security to the community into which the defendant is released by enabling the United States Probation Office to monitor him during the transition period. See 18 U.S.C. 3553(a)(2)(C). Those purposes cannot effectively be served until the defendant is living in the community.

The mere fact that a defendant has served more time in prison than he would have served, if a judicial decision affecting the validity of a portion of his sentence had been announced earlier, offers no assurance that his transition into the community will be any less difficult. To the contrary, as Congress recognized, a defendant who is returning to the community "after the service of a long prison term" may be particularly in need of supervision. S. Rep. No. 225, *supra*, at 124; cf. Harold B. Wooten, *Violation of Supervised Release*, 6 Fed. Sentencing Rep. 183 (1993) ("With longer periods of incarceration come greater difficulties in reintegrating into communities. Social relationships must be built anew. Released offenders must find jobs when market skills have passed them by for all but the most menial tasks."). The court of appeals' position would recreate, with respect to defendants in respondent's position, a defect that Congress identified in the parole system and sought to eliminate with supervised release: that a defendant's period of supervision after his release from prison turned "on the almost sheer accident of the amount of time that happens to remain of the term of imprisonment when the defendant is released," rather than on the needs of the defendant and the community. S. Rep. No. 225, *supra*, at 124.

In sum, because Congress intended that incarceration and supervised release would serve different purposes, prison time cannot properly be treated as interchangeable with time on supervised release. As the First Circuit has explained in reaching a result contrary to that of the Sixth Circuit in this case:

> [S]upervised release is intended to facilitate the integration of the violator into the community, while providing the supervision designed to limit further criminal conduct. Incarceration, to the contrary, does nothing to assist a defendant's transition back into society and is not a reasonable substitute for a portion of the supervised release term.

*Joseph*, 109 F.3d at 38-39 (internal quotation marks and citations omitted). Indeed, this Court has reached a similar conclusion with respect to another form of community supervision, observing that "probation and imprisonment are not fungible; they are sentences fundamentally different in character." *Granderson*, 511 U.S. at 46 (internal quotation marks omitted). So, too, terms of supervised release and terms of incarceration "are not fungible" because they are "fundamentally different in character."

### C. Congress Has Provided A Different Avenue Of Relief For A Defendant Who Has Been Incarcerated On A Subsequently Vacated Conviction

A person in respondent's position is not without a means of seeking relief from a lengthy term of supervised release. Under 18 U.S.C. 3583(e)(1), a district court may "terminate a term of supervised release and discharge the defendant released at any time after the expiration of one year of supervised release * * * if it is satisfied that such action is warranted by the conduct



of the defendant released and the interest of justice." As the Fifth Circuit has suggested, in assessing whether a defendant's supervised release should be terminated early in "the interest of justice," a district court "may take into account the fact that a defendant served time under a wrongful conviction and sentence." *United States* v. *Jeanes*, 150 F.3d 483, 485 (1998); accord *Joseph*, 109 F.3d at 39; cf. *United States* v. *Spinelle*, 41 F.3d 1056, 1060-1061 (6th Cir. 1994) (statute requiring a minimum term of supervised release does not preclude a district court from exercising its authority under Section 3583(e)). A district court may also "modify" or "reduce" any condition of supervised release "at any time prior to the expiration or termination of the term of supervised release." 18 U.S.C. 3583(e)(2).

In a related context, the Sentencing Commission has indicated that discretionary reduction of a term of supervised release under Section 3583(e), rather than automatic reduction or elimination of that term, is the proper response when a defendant's term of imprisonment is reduced because of a retroactively applied change in the law. The Sentencing Commission has provided that, in cases where a defendant has served more time in prison than would be required under an amendment to the Sentencing Guidelines, the district court cannot reduce the defendant's sentence to less than time served. Sentencing Guidelines § 1B1.10(b). The court may, however, take the defendant's excess prison time into account as part of the totality of circumstances bearing on whether to grant a motion for early termination of supervised release under Section 3583(e)(1). Sentencing Guidelines § 1B1.10, comment. (n.5). The Sentencing Commission also made clear that "the fact that a defendant may have served a longer term of imprisonment than the court determines would

have been appropriate in view of the amended guideline range shall not, without more, provide a basis for early termination of supervised release." *Ibid.*[8]

Although a defendant who has spent excess time in prison in connection with an invalidated sentence is not entitled to a credit against the time that he still must serve on supervised release, he would be entitled to a credit against the time that he still must serve in prison in connection with another sentence that was to run consecutively to the invalidated sentence. That is because "[m]ultiple terms of imprisonment ordered to run consecutively or concurrently shall be treated for administrative purposes as a single, aggregate term of imprisonment." 18 U.S.C. 3584(c). Respondent was unable to take advantage of that mechanism because he had no additional federal prison time to serve. But that is no reason to undermine the function of supervised release by automatically excusing those in respondent's circumstances from all, or some portion, of their terms of supervised release.[9]

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[8] The Sentencing Commission adopted that approach to prevent a defendant from circumventing the supervised-release process by obtaining a retroactive reduction of his sentence to less than time served. See note 5, *supra* (discussing *Blake*).

[9] In some circumstances, a person who has served time in prison in connection with a federal conviction that is subsequently invalidated may be entitled to compensation from the United States. See 28 U.S.C. 1495 (authorizing damages action in the Court of Federal Claims "by any person unjustly convicted of an offense against the United States and imprisoned"); 28 U.S.C. 2513 (setting forth the conditions under which damages may be obtained under Section 1495 and limiting such damages to $5000). The courts of appeals have agreed that Section 1495 provides a remedy only to "those who can show that they are innocent of any criminal offense." *Betts* v. *United States*, 10 F.3d 1278, 1283 (7th Cir. 1993); see *Osborn* v. *United States*, 322 F.2d 835, 840 (5th Cir. 1963) ("[T]he claimant must be innocent of the particular charge and of any other crime or offense that any of his acts might constitute.") (quoting H.R. Rep. No. 2299, 75th Cong., 3d Sess. 2 (1938)); *United States* v. *Brunner*, 200 F.2d 276, 280 (6th Cir. 1952) ("Innocence of the [claimant] must be affirmatively established and neither a dismissal nor a judgment of not guilty on technical grounds is enough.").



In sum, given that a defendant who has served excess time in prison as a result of a subsequently invalidated conviction *may* obtain a reduction in his term of supervised release, if the district court determines that such a reduction is justified by the defendant's conduct and "the interest of justice," there is little equitable force to the court of appeals' position that such a defendant *must* receive a reduction in his term of supervised release without regard for the needs of the defendant and the community into which he is released. No reason therefore exists to depart from the plain language of the statute, which states that a term of supervised release begins when the defendant is released from prison, and not while he remains in federal, state, or local custody. 18 U.S.C. 3624(e).

## CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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## APPENDIX

### STATUORY PROVISONS INVOLVED

Section 3553(a) of Title 18 of the United States Code provides as follows:

**Factors To Be Considered In Imposing A Sentence.**—The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider—

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed—

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for—

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, and that are in effect on the date the defendant is sentenced; or

(B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code;

(5) any pertinent policy statement issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(2) that is in effect on the date the defendant is sentenced;

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

Section 3583 of Title 18 of the United States Code provides as follows:

**Inclusion Of A Term Of Supervised Release After Imprisonment**

**(a) In General.**—The court, in imposing a sentence to a term of imprisonment for a felony or a misdemeanor, may include as a part of the sentence a requirement that the defendant be placed on a term of supervised release after imprisonment, except that the court shall include as a part of the sentence a require-



ment that the defendant be placed on a term of supervised release if such a term is required by statute or if the defendant has been convicted for the first time of a domestic violence crime as defined in section 3561(b).

**(b) Authorized Terms Of Supervised Release.**—Except as otherwise provided, the authorized terms of supervised release are—

(1) for a Class A or Class B felony, not more than five years;

(2) for a Class C or Class D felony, not more than three years; and

(3) for a Class E felony, or for a misdemeanor (other than a petty offense), not more than one year.

**(c) Factors To Be Considered In Including A Term Of Supervised Release.**—The court, in determining whether to include a term of supervised release, and, if a term of supervised release is to be included, in determining the length of the term and the conditions of supervised release, shall consider the factors set forth in section 3553(a)(1), (a)(2)(B), (a)(2)(C), (a)(2)(D), (a)(4), (a)(5), and (a)(6).

**(d) Conditions Of Supervised Release.**—The court shall order, as an explicit condition of supervised release, that the defendant not commit another Federal, State, or local crime during the term of supervision and that the defendant not unlawfully possess a controlled substance. The court shall order as an explicit condition of supervised release for a defendant convicted for the first time of a domestic violence crime as defined in section 3561(b) that the defendant attend a public,

private, or private nonprofit offender rehabilitation program that has been approved by the court, in consultation with a State Coalition Against Domestic Violence or other appropriate experts, if an approved program is readily available within a 50-mile radius of the legal residence of the defendant. The court shall order, as an explicit condition of supervised release for a person described in section 4042(c)(4), that the person report the address where the person will reside and any subsequent change of residence to the probation officer responsible for supervision, and that the person register in any State where the person resides, is employed, carries on a vocation, or is a student (as such terms are defined under section 170101(a)(3) of the Violent Crime Control and Law Enforcement Act of 1994). The court shall also order, as an explicit condition of supervised release, that the defendant refrain from any unlawful use of a controlled substance and submit to a drug test within 15 days of release on supervised release and at least 2 periodic drug tests thereafter (as determined by the court) for use of a controlled substance. The condition stated in the preceding sentence may be ameliorated or suspended by the court as provided in section 3563(a)(4). The results of a drug test administered in accordance with the preceding subsection shall be subject to confirmation only if the results are positive, the defendant is subject to possible imprisonment for such failure, and either the defendant denies the accuracy of such test or there is some other reason to question the results of the test. A drug test confirmation shall be a urine drug test confirmed using gas chromatography/mass spectrometry techniques or such test as the Director of the Administrative Office of the United States Courts after consultation with the Secretary of Health and Human Services may determine to



be of equivalent accuracy. The court shall consider whether the availability of appropriate substance abuse treatment programs, or an individual's current or past participation in such programs, warrants an exception in accordance with United States Sentencing Commission guidelines from the rule of section 3583(g) when considering any action against a defendant who fails a drug test. The court may order, as a further condition of supervised release, to the extent that such condition—

(1) is reasonably related to the factors set forth in section 3553(a)(1), (a)(2)(B), (a)(2)(C), and (a)(2)(D);

(2) involves no greater deprivation of liberty than is reasonably necessary for the purposes set forth in section 3553(a)(2)(B), (a)(2)(C), and (a)(2)(D); and

(3) is consistent with any pertinent policy statements issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a);

any condition set forth as a discretionary condition of probation in section 3563(b)(1) through (b)(10) and (b)(12) through (b)(20), and any other condition it considers to be appropriate. If an alien defendant is subject to deportation, the court may provide, as a condition of supervised release, that he be deported and remain outside the United States, and may order that he be delivered to a duly authorized immigration official for such deportation.

**(e) Modification Of Conditions Or Revocation.**—The court may, after considering the factors set forth in section 3553(a)(1), (a)(2)(B), (a)(2)(C), (a)(2)(D), (a)(4), (a)(5), and (a)(6)—

(1) terminate a term of supervised release and discharge the defendant released at any time after the expiration of one year of supervised release, pursuant to the provisions of the Federal Rules of Criminal Procedure relating to the modification of probation, if it is satisfied that such action is warranted by the conduct of the defendant released and the interest of justice;

(2) extend a term of supervised release if less than the maximum authorized term was previously imposed, and may modify, reduce, or enlarge the conditions of supervised release, at any time prior to the expiration or termination of the term of supervised release, pursuant to the provisions of the Federal Rules of Criminal Procedure relating to the modification of probation and the provisions applicable to the initial setting of the terms and conditions of post-release supervision;

(3) revoke a term of supervised release, and require the defendant to serve in prison all or part of the term of supervised release authorized by statute for the offense that resulted in such term of supervised release without credit for time previously served on post-release supervision, if the court, pursuant to the Federal Rules of Criminal Procedure applicable to revocation of probation or supervised release, finds by a preponderance of the evidence that the defendant violated a condition of supervised release, except that a defendant whose



term is revoked under this paragraph may not be required to serve more than 5 years in prison if the offense that resulted in the term of supervised release is a class A felony, more than 3 years in prison if such offense is a class B felony, more than 2 years in prison if such offense is a class C or D felony, or more than one year in any other case; or

(4) order the defendant to remain at his place of residence during nonworking hours and, if the court so directs, to have compliance monitored by telephone or electronic signaling devices, except that an order under this paragraph may be imposed only as an alternative to incarceration.

**(f) Written Statement Of Conditions.**—The court shall direct that the probation officer provide the defendant with a written statement that sets forth all the conditions to which the term of supervised release is subject, and that is sufficiently clear and specific to serve as a guide for the defendant's conduct and for such supervision as is required.

**(g) Mandatory Revocation For Possession Of Controlled Substance Or Firearm Or For Refusal To Comply With Drug Testing.**—If the defendant—

(1) possesses a controlled substance in violation of the condition set forth in subsection (d);

(2) possesses a firearm, as such term is defined in section 921 of this title, in violation of Federal law, or otherwise violates a condition of supervised release prohibiting the defendant from possessing a firearm; or

(3) refuses to comply with drug testing imposed as a condition of supervised release;

the court shall revoke the term of supervised release and require the defendant to serve a term of imprisonment not to exceed the maximum term of imprisonment authorized under subsection (e)(3).

**(h) Supervised Release Following Revocation.**—When a term of supervised release is revoked and the defendant is required to serve a term of imprisonment that is less than the maximum term of imprisonment authorized under subsection (e)(3), the court may include a requirement that the defendant be placed on a term of supervised release after imprisonment. The length of such a term of supervised release shall not exceed the term of supervised release authorized by statute for the offense that resulted in the original term of supervised release, less any term of imprisonment that was imposed upon revocation of supervised release.

**(i) Delayed Revocation.**—The power of the court to revoke a term of supervised release for violation of a condition of supervised release, and to order the defendant to serve a term of imprisonment and, subject to the limitations in subsection (h), a further term of supervised release, extends beyond the expiration of the term of supervised release for any period reasonably necessary for the adjudication of matters arising before its expiration if, before its expiration, a warrant or summons has been issued on the basis of an allegation of such a violation.



Section 3624 of Title 18 of the United States Code provides, in pertinent part, as follows:

**Release of a prisoner**

**(a) Date Of Release.**—A prisoner shall be released by the Bureau of Prisons on the date of the expiration of the prisoner's term of imprisonment, less any time credited toward the service of the prisoner's sentence as provided in subsection (b). If the date for a prisoner's release falls on a Saturday, a Sunday, or a legal holiday at the place of confinement, the prisoner may be released by the Bureau on the last preceding weekday.

* * * * *

**(e) Supervision After Release.**—A prisoner whose sentence includes a term of supervised release after imprisonment shall be released by the Bureau of Prisons to the supervision of a probation officer who shall, during the term imposed, supervise the person released to the degree warranted by the conditions specified by the sentencing court. The term of supervised release commences on the day the person is released from imprisonment and runs concurrently with any Federal, State, or local term of probation or supervised release or parole for another offense to which the person is subject or becomes subject during the term of supervised release. A term of supervised release does not run during any period in which the person is imprisoned in connection with a conviction for a Federal, State, or local crime unless the imprisonment is for a period of less than 30 consecutive days. No prisoner shall be released on supervision unless such prisoner agrees to adhere to an installment schedule, not to exceed two years except in special circumstances, to

pay for any fine imposed for the offense committed by such prisoner.

(5)

No. 98-1696

Supreme Court, U.S.
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in the

# Supreme Court

of the

# United States

October Term 1998

UNITED STATES OF AMERICA,

*Petitioner,*

*vs.*

ROY LEE JOHNSON

*Respondent.*

**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT**

## BRIEF OF RESPONDENT

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## QUESTION PRESENTED FOR REVIEW

Whether a federal criminal defendant should be given credit against a term of supervised release for time spent in prison later determined to have been improperly served.

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**STATEMENT**

Following a jury trial in the District Court for the Eastern District of Michigan, Respondent Roy Lee Johnson was convicted on November 27, 1990, of two counts of using a firearm in relation to a drug trafficking offense (18 U.S.C. § 924(c)), two counts of possession with the intent to distribute a controlled substance (21 U.S.C. § 841), and one count of felon in possession of a firearm (18 U.S.C. § 922(g)). As a result of these convictions, Respondent was sentenced on January 25, 1991 to 51 months on the possession charges, and two consecutive 60 month sentences on the 924(c) counts, for a total sentence of 171 months.

Respondent appealed his conviction to the Sixth Circuit Court of Appeals (91-1200,91-1201), and on June 16, 1994, that court remanded the case, ordering that the sentences on the § 924(c) convictions be imposed to run concurrently. Respondent was subsequently resentenced on August 30, 1994

to a term of 111 months incarceration. Pet. App. 11a.

Respondent then filed into district court a motion pursuant to 28 U.S.C. § 2255, raising the following issues:

I. His § 924(c) counts should be vacated due to new Supreme Court precedent of *Bailey v. United States*, 516 U.S. 137, 116 S.Ct. 501, 133 L.Ed.2d 472 (1995);

II. His conviction was invalid due to counsel's failure to raise a *Batson* challenge;

III. His conviction was invalid due to counsel's failure to pursue a motion to suppress;

IV. The sentence imposed by the court violated due process;

V. That an evidentiary hearing was required.

A motion for bond pending the outcome of the § 2255 motion was also filed. Pet. App. 12a.

On May 2, 1996, the district court held a hearing on the bond motion, and at that hearing, granted Respondent's first claim in



the § 2255 petition. The court vacated the § 924 convictions, and ordered Respondent's immediate release, as he had served more time than was required under the revised sentence. Pet. App. 12a.

On June 7, 1996, Respondent filed a motion requesting that the balance of any supervised release term be vacated, to account for the additional period of incarceration he served beyond what could have been imposed under a correct application of § 924(c). On January 22, 1997, the district court filed an order denying all other portions of Respondent's § 2255 petition, and denying the motion for termination of supervised release. Pet. App. 9a-17a. The district court found that the purposes of supervised release were not met by Respondent's incarceration, and that the language of the statute required the term to run when Respondent was actually released from incarceration. Pet. App. 15a-16a.

Respondent appealed this denial to the

Sixth Circuit Court of Appeals. The court considered the provisions of 18 U.S.C. § 3624(e), which state "a term of supervised release commences on the day the person is released from imprisonment," and that a "term of supervised release does not run during any period in which the person is imprisoned in connection with a conviction for a Federal, State, or local crime." The court acknowledged that when read in isolation, 18 USC § 3624(e) would appear to restrict crediting against a term of supervised release, the additional time erroneously incarcerated. The court held, however, that § 3624(e) should be read in conjunction with § 3624(a), which requires that an inmate "be released by the Bureau of Prisons on the date of the expiration of prisoner's term of imprisonment," thereby giving effect to Congress's intent that a prisoner be released from prison upon the expiration of a valid sentence. Reading the statute in this manner would be appropriate as Congress



had not anticipated the effect of a retroactive invalidation of sentences when drafting the statute. The court held that "Respondent was not imprisoned in connection with a conviction for a Federal . . . crime' during the these two and a half years because the conviction for which he was being held was invalid." The court also concluded that Respondent's date of release for purposes of the statute "was the date he was entitled to be released rather than the day he walked out the prison door." Pet. App. 4a-5a. The Respondent's supervised release was thus vacated. A petition for rehearing en banc by the United States was denied on January 21, 1999.

## ADOPTION

The Respondent agrees with the accuracy of Petitioner's Opinions Below, Statutory Provisions, and Jurisdictional statement, and adopts those as his own.



## SUMMARY OF ARGUMENT

Respondent submits that 18 U.S.C. § 3624 is ambiguous, in that it contains provisions which in the Respondent's case lead to contradictory results. The Respondent further contends that if this Court would find that the statute is not ambiguous, then its application as the United States suggests is contrary to the intent of Congress, as expressed in its enactment of 18 U.S.C. § 3742 and 28 U.S.C. § 2255, and therefore, it should be applied based upon Congress's intent, instead of the strict language of the statute.

Further, the Respondent submits that this Court's precedent supports an argument that credit should be given against post-incarceration supervision for an erroneous sentence. Further, the provisions of supervised release would not be addressed by granting the United States relief in

this case.

18 U.S.C. § 3583 is unavailing to assist the Respondent, as it does not provide immediate relief, and provides too much discretion on the part of the district court to rely upon for relief.



## ARGUMENT

**A federal criminal defendant should be given credit against a term of supervised release for time spent in prison later determined to have been improperly served**

### A. 18 U.S.C. § 3624 Is Ambiguous

The Respondent first submits that various provisions of § 3624 conflict with one another, and therefore are ambiguous.

"Our first step in interpreting a statute is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case. Our inquiry must cease if the statutory language is unambiguous and the statutory scheme is coherent and consistent." *Robinson v. Shell Oil Co.*, 519 U.S. 337,340 (1997)

Thus, the first proper inquiry is

whether or not the statute is plain and unambiguous. However, unlike the United States' argument would seem to suggest, this Court is not limited to reviewing solely the language of 18 U.S.C. § 3624(e) in making its determination. Rather, "[t]he plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." 519 U.S. at 341 As this Court found in the case of *U.S. National Bank of Oregon v. Independent Insurance Agents of America, Inc.*, 508 U.S. 439, 113 S.Ct. 2173 (1993), "[o]ver and over we have stressed that in expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy." 508 U.S. at 455

The Respondent submits that when the entire statute is reviewed, the provisions



of § 3624 are found to be ambiguous, and not coherent and consistent with one another. Specifically, provisions (a) and (e) of the statute are in conflict, and create an ambiguity which has split the circuits.

Particularly, 18 U.S.C. § 3624(a) provides that "[a] prisoner shall be released by the Bureau of Prisons on the date of the expiration of the prisoner's term of imprisonment. . ." The Sixth Circuit, in deciding the case below, determined that to give § 3624(e) a literal interpretation would be in contradiction to this subsection of the statute. The court reasoned that provision (a) "embodies Congress's intent that a prisoner not be held in prison following the expiration of a valid prison term." *Johnson v. United States*, 154 F.3d 569,571 (6th C. 1998)

The Ninth Circuit came to a similar conclusion in the case of *United States v. Blake*. 88 F.3d 824 (9th C. 1996) The court

in that case was reviewing a Guideline which had been given retroactive application. The court reasoned that Congress (through the Sentencing Commission), would not have made the Guideline amendment retroactive unless it intended that some relief could be provided. The court further found that subsections (a) and (e) of § 3624 were contrary to one another, and that lenity required favorable application to the defendant.

In the main case cited by the United States, the First Circuit held that 18 U.S.C. § 3624(e) requires that no credit be given against supervised release for time spent incarcerated. *United States v. Joseph*, 109 F.3d 34,37 (1st C. 1997) However, the First Circuit relied solely on the language of § 3624(e), and did not undertake an analysis of the interplay between §§ (a) and (e). Instead, and despite the court's sympathy for the



equitable argument that credit should be given, the court simply reverted to the language of subsection (e) as the beginning and end of its analysis. *Id.*

Although the Respondent recognizes that a division of judicial authority alone does not create ambiguity (*Reno v. Koray*, 515 U.S. 50, 115 S.Ct. 2021 (1995)), the Respondent submits that the several courts' analyses of the various subsections of § 3624 provide some evidence that the statute is not as clear as the United States would suggest. Rather, when subsections (a) and (e) are read together, and then applied to a situation such as the Respondent's, a clear anomaly results which proves the ambiguity of the statute.

If the Court finds the statute to be ambiguous, then it must uphold the relief granted by the Sixth Circuit. As this Court found in *United States v. Bass*, 404 U.S. 336, 92 S.Ct. 515 (1971), "where there is ambiguity in a criminal statute, doubts

are resolved in favor of the defendant." 404 U.S. at 348 Lenity requires using a construction resulting in a shorter sentence. *United States v. R.L.C.*, 503 U.S. 291,305, 112 S.Ct. 1329,1338 (1992) Therefore, if this Court finds the statute to be ambiguous, as it must, the relief granted by the Sixth Circuit was proper, and should be upheld.

**B. A Literal Interpretation Of 18 U.S.C. § 3624(e) Is At Odds With Congressional Intent**

The Respondent would also submit that a literal interpretation of 18 U.S.C. § 3624(e) is at odds with Congress's clear intent to allow appeals from Guidelines determinations.

In the case of *United States v. Ron Pair Enterprises*, 489 U.S. 235, 109 S.Ct. 1026 (1989), this Court held that even where the meaning of a statute is plain, this Court may determine a different meaning to the statute where "the literal



application of a statute will produce a result demonstrably at odds with the intentions of its drafters." 489 U.S. at 242 The Court further found that "In such cases, the intention of the drafters, rather than the strict language, controls." *Id.*

A review of the entire P.L. 98-473 shows that Congress clearly intended to allow credit on supervised release, in the event a sentence was erroneously longer than it should have been.

Under 18 U.S.C. § 3742, Congress has issued a clear statement that it encourages appeals from an incorrect application of the Sentencing Guidelines. *18 U.S.C. § 3742(a)(2)* As the legislative history regarding § 3742 notes, "Appellate review of sentences is essential to assure that the guidelines are applied properly and to provide case law development of the appropriate reasons for sentencing outside the guidelines." *Comprehensive Crime*

*Control Act of 1984, Pub.L. No. 98-473,* 1984 U.S.C.C.A.N. (98 Stat.1987) p.3334 Thus, it is clear that Congress intended to allow for full appellate review of guidelines determinations.

Further, it is also clear from the legislative history that Congress intended to provide for relief upon an appellate finding of an incorrect application of the Guidelines. As the legislative record clearly states "[t]he Committee intends that a sentence be subject to modification through the appellate process, though it is final for other purposes." *Id.* at p.3337

The import of these statements is that, if this Court upholds the United States' position regarding supervised release credit, then it will serve to moot a significant number of appeals that Congress otherwise clearly intended to allow. Indeed, every defendant who is serving a sentence imposed under the Guidelines of 3 years or less has the



possibility of having his appeal of a Guidelines issue mooted, depending on the swiftness of the appellate process. Under the United States' reading of 18 U.S.C. § 3624(e), any Guidelines appeal would become mooted upon the appellant's release from prison, because, regardless of the correctness or incorrectness of the district court's application of the Guidelines, the court of appeals could provide no relief.

In addition to the court of appeals decision in the instant case, several other circuits have also concluded that in order to provide meaningful relief under 18 U.S.C. § 3742, credit from a supervised release term is a valid exercise of judicial authority. In the case of *United States v. Cottman*, 142 F.3d 160 (3rd C. 1998), the Third Circuit addressed the issue of whether or not an appeal of the Guidelines issue was moot, based upon the appellant's release from prison. The court

recognized that if the challenge was successful, that he would be able to have credit on his supervised release term for the erroneous time spent incarcerated. *Id.* at 165 A similar result occurred in the case of *United States v. Fadayani*, 28 F.3d 1236 (D.C. Cir. 1994), where the court found that the appeal was not moot despite the appellants' release from prison because "if the appellants' sentences were reduced, each might be eligible for a credit against their period of supervised release for the excess time they spent in prison." *Id.* at 1241 *but see United States v. Ross*, 77 F.3d 1525,1549 (n. 6) (7th C. 1996)

The above cases present concrete examples of Congress's intent (under 18 U.S.C. § 3742) to allow sucn appeals from Guidelines determinations. The Respondent submits that it is clear from the legislative history of § 3742 that Congress did not intend a result which would moot cases such as the Respondents. Therefore,



to read the statute literally in this instance is to thwart Congressional intent, and to render superfluous § 3742 for a significant number of defendants. "Our cases consistently have expressed `a deep reluctance to interpret a statutory provision so as to render superfluous other provisions in the same enactment.'" *Freytag v. C.I.R.*, 501 U.S. 868,877 , 111 S.Ct. 2631,2638 (1991)(internal cite omitted) On this basis, the Court of Appeals decision should be upheld.

Application of § 3624(e) as the United States suggests would also be in contradiction to Congress's intent under 28 U.S.C. § 2255. That statute allows a defendant to challenge his conviction and/or sentence, while the defendant is "in custody". *28 U.S.C. § 2255* This Court has long held that a defendant is "in custody" if he is on parole, as even though the defendant is not incarcerated, he is still under constraints of the sentence. *Jones v.*

*Cunningham*, 371 U.S. 236 (1963)

If in fact no relief could be provided after the defendant is released from prison, this Court would not have expanded the "in custody" requirement beyond incarceration. Clearly, Congress intended a defendant to obtain relief from his conviction or sentence under 28 U.S.C. § 2255.

Therefore, the intention of Congress through 28 U.S.C. § 2255 and 18 U.S.C. § 3742 was to allow the type of relief granted in the instant case.

**C. The Result Suggested By The United States Would Be In Contravention To This Court's Prior Precedent**

In the case of *Mabry v. Johnson*, 467 U.S. 504, 104 S.Ct. 2543 (1984), the defendant argued that he should receive a lower sentence, as the state did not specifically perform all aspects of his plea agreement, which caused a higher than warranted sentence. Prior to disposition



of the appellate process, the defendant was released on parole. The issue of mootness was therefore raised for this Court's attention.

The Court determined that the case was not moot. Specifically, the Court noted that the outcome of the defendant's challenge to his sentence could affect the date on which parole would expire, and thus, the matter was not moot. 467 U.S. at 511

The Respondent recognizes that the *Mabry* case was based on Arkansas parole law. However, the rationale is the applicable to the present dispute. The *Mabry* Court would not have heard the case unless some relief could have been granted. Using the same rationale is as used by the United States in this case, a defendant cannot be incarcerated and on parole for the same offense at the same time. Obviously, this Court determined that relief could be granted, in the form of

credit off of parole to be served, even though the "credit" came from the sentence, and not the parole term. This rationale should be upheld in the present case.

**D. The Purposes Of Continued Supervised Release Would Not Be Served In The Present Case**

The United States argues that no credit should be given against the Respondent's supervised release, because the purposes of supervised release and imprisonment are different, and providing such credit would undermine society's value of supervised release.

First, it should be noted that supervised release is a form of punishment. As the Third Circuit has found "Supervised release is punishment; it is a deprivation of some portion of one's liberty imposed as a punitive measure for a bad act." *United States v. Dozier*, 119 F.3d 239,242 (3rd C. 1997) Therefore, simply because the punishment is not identical to



incarceration does not mean that credit cannot be given.

Further, and more importantly, the goals listed by the United States as being important distinctions have no relevance in the Respondent's case. The Court of Appeals decided this matter on August 26, 1998. Since that time, the Respondent has not been subject to supervised release. Thus, for over one year, the Respondent has been fully and successfully re-integrated into society. It would not serve any purpose, at this point, to re-impose a term of supervised release as to the Respondent, as none of the goals suggested by the United States as purposes for continued supervision are present.

In short, the Respondent submits that incarceration and supervised release are not so dissimilar that time spent under the more severe restraint cannot be credited against the other. In addition, no reason exists to re-impose supervised release in

the present case. Thus, the Sixth Circuit's opinion should be upheld.

**E. Petitioner's Reliance On 18 U.S.C. § 3583 Is Unavailing**

The United States suggests that the relief granted by the Sixth Circuit in this case is not warranted, because 18 U.S.C. § 3583 provides a basis for relief from supervised release.

18 U.S.C. § 3583(e) allows a defendant's supervised release to be terminated by the sentencing court upon the expiration of 1 year of supervised release. Thus, the defendant must serve an entire year of supervised release before he or she can request such relief. Second, the criteria for relief is based upon the defendant's conduct while on release.

This statute does not provide meaningful relief for defendants such as the Respondent. The Respondent served 2 and one half years incarcerated beyond what he was required to serve under the law.



His term of supervised release was 3 years. Therefore, if courts can grant credit for time served against supervised release, the Respondent's supervised release would have lasted approximately six months. Under the scenario suggested by the United States, he would have to serve an entire year before even becoming eligible for relief.

Further, there is no guarantee that the Respondent will obtain the relief he would seek under 18 U.S.C. § 3583(e). As the Fifth Circuit noted in *United States v. Jeanes*, 150 F.3d 483 (5th C. 1998), the sentencing court retains "broad discretion" in determining these requests. *Id.* at 484 Therefore, relief is far from a certainty.

The Respondent submits that 18 U.S.C. § 3583(e) does not provide a sufficient basis for relief from term of incarceration wrongfully served. The only appropriate relief is the relief granted by the Sixth Circuit in this matter.

"The decisions of this Court havee repeatedly warned against the dangers of an approach to statutory construction whiich confined itself to the bare words of tthe statute [internal cite omitted], for literalness may strangle meaning." *Lynnch v. Overholser*, 369 U.S. 705, , 82 S.Ct. 1063,1067 (1962) The Respondent submitts that the full language of the enactmennt, as well as the legislative history, expreess an intent to allow relief from a wrongfullly imposed sentence. This Court should therefore uphold the decision of the Sixth Circuit, as it comports with the intennt of Congress, and is fundamentally fair.



**CONCLUSION**

The Respondent requests that this Court uphold the finding of the Court of Appeals in this matter.

Respectfully submitted,

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No. 98-1696

# In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

*v.*

ROY LEE JOHNSON

*ON WRIT OF CERTIORARI*
*TO THE UNITED STATES COURT OF APPEALS*
*FOR THE SIXTH CIRCUIT*

## REPLY BRIEF FOR THE UNITED STATES

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# In the Supreme Court of the United States

No. 98-1696

UNITED STATES OF AMERICA, PETITIONER

*v.*

ROY LEE JOHNSON

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT*

## REPLY BRIEF FOR THE UNITED STATES

### A. Congress Unambiguously Provided That A Defendant's Term Of Supervised Release Commences Only When He Is Actually Released From Prison

Our submission in this case is that a term of supervised release commences only when a defendant is actually released from prison, and not on an earlier date when he should, in retrospect, have been released under a subsequent judicial decision that clarified the law. Respondent argues (Br. 11) that various provisions of federal sentencing law "are in conflict" and thus create ambiguity on this issue. Respondent is incorrect.

In the statute governing "Supervision after release," Congress provided that "[a] term of supervised release commences on the day the person is released from

imprisonment and runs concurrently with any Federal, State, or local term of probation or supervised release or parole for another offense to which the person is subject or becomes subject during the term of supervised release." 18 U.S.C. 3624(e). Congress further provided that "[a] term of supervised release does not run during any period in which the person is imprisoned [for 30 or more consecutive days] in connection with a conviction for a Federal, State, or local crime." *Ibid.* Section 3624(e) thus makes clear that a term of supervised release cannot commence before the day on which a person is actually released from prison—or, in other words, that a term of supervised release cannot run concurrently with a term of imprisonment (except a term, unlike respondent's here, of less than 30 days).

Respondent contends (Br. 9-14) that Section 3624(e) is ambiguous in its application to persons who served time in prison on a conviction that ultimately was ruled invalid under a subsequent judicial decision clarifying the law. Respondent locates (Br. 11) the source of that ambiguity in another subsection of the same statute, 18 U.S.C. 3624(a), which states, in pertinent part, that "[a] prisoner shall be released by the Bureau of Prisons on the date of the expiration of the prisoner's term of imprisonment," less any time credited toward his sentence for satisfactory behavior.

Contrary to respondent's assertions, no such ambiguity exists. Section 3624(a) says not a word about supervised release. And nothing in Section 3624(a) implies that an individual who is not released by the Bureau of Prisons on "the date of the expiration of [his] term of imprisonment" is entitled as a remedy to a reduction in his term of supervised release on a conviction that remains valid. Presumably, respondent would not contend that a defendant may avoid other terms of his



remaining sentence, such as the payment of a fine, as a remedy for a violation of Section 3624(a). There is no more support in Section 3624(a) for the remedy that respondent does suggest.

Indeed, Section 3624(a) does not appear to have been intended to address the situation of persons, such as respondent, who were released from prison on the very date prescribed under a revised sentence imposed by the district court.[1] Under the natural reading of Section 3624(a), such prisoners *are* released "on the date of the expiration of [their] term of imprisonment," notwithstanding that the date could have come earlier if the new judicial decision had been announced or applied to their case earlier.[2] Neither the text nor the legislative history of Section 3624(a) suggests that Congress

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[1] After the hearing on respondent's unopposed motion to vacate his Section 924(c) convictions under *Bailey* v. *United States*, 516 U.S. 137 (1995), the district court imposed a revised sentence directing that respondent be released from prison immediately. Judgment 2 (May 2, 1996). The Bureau of Prisons complied with that directive.

[2] Such a prisoner would not automatically be entitled to release on the day that his original term of imprisonment on any surviving counts would expire. For example, many district courts, after invalidating a defendant's sentence on a Section 924(c) count under *Bailey*, resentenced the defendant to an enhanced term of imprisonment on a surviving drug count based on his possession of a firearm. See Sentencing Guidelines § 2D1.1(b)(1). The courts of appeals have uniformly upheld such resentencings. See, *e.g.*, *United States* v. *Gordils*, 117 F.3d 99 (2d Cir.) (47-month and 37-month enhancements), cert. denied, 522 U.S. 975 (1997); *United States* v. *Morris*, 116 F.3d 501 (D.C. Cir.) (37-month and 17-month enhancements), cert. denied, 522 U.S. 975 (1997); *United States* v. *Davis*, 112 F.3d 118 (3d Cir.) (32-month enhancement), cert. denied, 522 U.S. 888 (1997); *United States* v. *Smith*, 103 F.3d 531 (7th Cir. 1996) (17-month enhancement), cert. denied, 520 U.S. 1248 (1997). The government did not seek such resentencing in this case.

intended the phrase "on the date of the expiration of the prisoner's term of imprisonment" to have the more esoteric meaning assumed by respondent and the court of appeals, *i.e.*, as either the date that the prisoner's term actually expired under the sentence imposed by the district court or on the earlier date on which the prisoner's term could have expired under a retroactively applied change in the law. To the contrary, as noted in our opening brief (at 13 n.7), the provision of Section 3624(a) on which respondent and the court of appeals rely was designed simply to provide a single straightforward rule governing the date of a prisoner's release, "replac[ing] a confusing array of statutes and administrative procedures concerning the determination of the date of release of a prisoner." S. Rep. No. 225, 98th Cong., 1st Sess. 144 (1983).[3]

[3] Amici National Association of Criminal Defense Lawyers, *et al.*, while not joining in respondent's statutory ambiguity argument, urge an extension of the common law doctrine of constructive parole, which permits a defendant to receive credit against his term of imprisonment for time erroneously spent at liberty through no fault of his own. See, *e.g.*, *White* v. *Pearlman*, 42 F.2d 788, 789 (10th Cir. 1930). Amici's argument is foreclosed by the plain language of Section 3624(e), which provides, *inter alia*, that "[a] term of supervised release does not run during any period [of 30 days or more] in which the person is imprisoned." Amici cite only one case that applied the constructive parole doctrine to credit time erroneously spent in prison against time to be spent on parole. *United States ex rel. Shuster* v. *Vincent*, 524 F.2d 153 (2d Cir. 1975). *Shuster* is distinguishable from this case not only because the state law in that case contained no provision similar to Section 3624(e), which would have barred a person's term of parole from running during his term of incarceration, but also because of its "appalling" facts "reminiscent of Solzhenitsyn's treatise" *The Gulag Archipelago* that persuaded the court of appeals to create an equitable remedy. 524 F.2d at 154 (noting that the petitioner was wrongfully confined in a mental institution and a prison for "44 years after conviction of a crime for which the average time of imprisonment before parole is 15 years").



**B. Terms Of Supervised Release Should Not Be Shortened In Order To Preserve Appeals That Would Otherwise Be Moot**

Respondent also contends (Br. 14) that, if the Court concludes that Section 3624 unambiguously provides that a defendant's term of supervised release commences only upon his release from prison, the Court should reject that "literal interpretation" of Section 3624 as contrary to "Congress's clear intent to allow appeals from [Sentencing] Guidelines determinations" under 18 U.S.C. 3742. Respondent notes that a defendant's appeal challenging the length of his term of imprisonment might become moot if the defendant has completed his term of imprisonment before the appeal is decided. But because the appeal would not be moot if the sentence still could have "collateral legal consequences" for the defendant after his release, *Sibron* v. *New York*, 392 U.S. 40, 57 (1968), respondent argues (Br. 15-19) that Section 3624 should be construed as creating such collateral legal consequences, *i.e.*, as providing that a reduction in a defendant's completed term of imprisonment reduces his remaining term of supervised release.[4]

Respondent's argument is without support in the text or legislative history of Section 3624, Section 3742, or any other provision of the Comprehensive Crime

[4] Respondent similarly contends (Br. 19-20) that a literal construction of Section 3624 "would also be in contradiction to Congress's intent under 28 U.S.C. § 2255" to allow defendants to seek post-conviction review of their sentences of imprisonment. That argument fails for the same reasons as does respondent's argument based on 18 U.S.C. 3742.

Control Act of 1984. Respondent does not identify any congressional expression of intent that supervised release serve as a mechanism to prevent defendants' appeals of terms of imprisonment from becoming moot as a result of the defendants' release from prison.

Instead, Congress chose a different, and more direct, mechanism to prevent sentencing appeals from becoming moot. In another section of the Comprehensive Crime Control Act, Congress specifically provided that a defendant may, in certain circumstances, be allowed to remain free pending an appeal of his conviction or sentence. 18 U.S.C. 3143(b). The district court must find that the defendant "is not likely to flee or pose a danger to the safety of any other person or the community," that the appeal "is not for the purpose of delay," and that the appeal "raises a substantial question" that is "likely to result" in reversal, a new trial, a sentence that does not include imprisonment, or "a reduced sentence to a term of imprisonment less than the total of the time already served plus the expected duration of the appeal process." *Ibid.* In light of Section 3143(b), which specifically addresses the concern that a defendant may have served his entire term of imprisonment before his appeal is decided, it is implausible that Congress also intended to address that concern through a per se rule requiring that time erroneously served in prison be credited against time on supervised release.

Respondent mistakenly asserts that two courts of appeals have "concluded that in order to provide meaningful relief under 18 U.S.C. § 3742, credit from a supervised release term is a valid exercise of judicial authority." Br. 17-18 (citing *United States* v. *Cottman*, 142 F.3d 160 (3d Cir. 1998), and *United States* v. *Fadayani*, 28 F.3d 1236 (D.C. Cir. 1994)). In those



cases, the courts held that the defendants' appeals of sentences of imprisonment were not moot, even though the defendants had been released from prison, because the courts could not conclude that there was "no *possibility* that any collateral legal consequences will be imposed" on the defendants as a result of the sentences. *Fadayani*, 28 F.3d at 1241 (quoting *Sibron*, 392 U.S. at 57); accord *Cottman*, 142 F.3d at 164.[5] The courts identified two such possible "collateral legal consequences": first, that a reduction in the defendant's completed term of imprisonment could, under the Sentencing Guidelines, affect the duration of any future term of imprisonment that the defendant might receive, *Cottman*, 142 F.3d at 164-165; and, second, that a reduction in the defendant's completed term of imprisonment "would likely merit a credit against [his] period of supervised release," *id.* at 165. The courts did not definitively hold in either case that a defendant is automatically entitled to credit against his time on supervised release for any time that he erroneously spent in prison. The courts simply assumed that such

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[5] An application of the *Sibron* rule in the sentencing context can be found in *Mabry* v. *Johnson*, 467 U.S. 504 (1984), which respondent erroneously claims (Br. 20) to be "[i]n [c]ontravention [t]o" the government's position in this case. In *Mabry*, a state prisoner sought by a petition for habeas corpus to enforce a proposed plea agreement that would have allowed his term of imprisonment on a new conviction to run concurrently with his terms of imprisonment on earlier convictions. In a footnote, this Court observed that the case was not mooted by the prisoner's release on parole because "whether [he] must serve the sentence now under attack consecutively to his prior sentences will affect the date at which his parole will expire under state law." 467 U.S. at 507 n.3. As respondent concedes (Br. 21), *Mabry* "was based on Arkansas parole law." *Mabry* thus has no relevance to the construction of the federal statutory provisions at issue in this case.

credit was a possible "collateral legal consequence" of a reduction in the defendant's completed sentence of imprisonment. See *Fadayani*, 28 F.3d at 1241 ("Although the government may be correct that both of these contingencies are remote, *Sibron* requires only that they be possible."). The courts' one-sentence discussion in each case of whether a reduction in a defendant's term of imprisonment might affect his term of supervised release—unaccompanied by any citation of authority, except in *Cottman* to *Fadayani*—reflects no consideration of the statutes governing supervised release or, by the time of *Cottman*, the conflicting appellate decisions on the question presented here. And nothing in either case supports respondent's assertion (Br. 27) that the courts actually concluded that credit was necessary "in order to provide meaningful relief under 18 U.S.C. § 3742."[6]

Finally, contrary to respondent's assertions, the literal meaning of Section 3624(e)—that a person's term of supervised release does not begin until he is actually released from prison—accords with Congress's intent in enacting the supervised release provisions of the

[6] In any event, *Cottman* and *Fadayani* appear to involve defendants who were seeking to have their sentences of imprisonment reduced to one year or less. See *Cottman*, 142 F.3d at 165; *Fadayani*, 28 F.3d at 1241. Such a reduction could potentially affect a defendant's sentence of supervised release because the Sentencing Guidelines prescribe supervised release only when a defendant is sentenced to imprisonment for more than one year (or when required by statute). See Sentencing Guidelines § 5D1.1(a) and (b). A reduction in the defendants' sentences in *Cottman* and *Fadayani* could thus have enabled the district courts to reconsider whether to impose any term of supervised release. See *United States* v. *Eske*, 925 F.2d 205, 206 n.2 (7th Cir. 1991) (holding that an appeal of a completed term of imprisonment was not moot in such circumstances).



Comprehensive Crime Control Act. As explained in our opening brief (at 14-18), Congress intended that supervised release would serve purposes distinct from incarceration. Supervised release was designed "to ease the defendant's transition into the community," "to provide rehabilitation" through "supervision and training programs after release," and thereby to protect the community into which the defendant is released. S. Rep. No. 225, *supra*, at 124; see also 18 U.S.C. 3553(a)(2)(B)-(D), 3583(c) (identifying the sentencing considerations applicable to supervised release as including "to afford adequate deterrence to criminal conduct," "to protect the public from further crimes of the defendant," and "to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment").[7] Supervised release, unlike incarceration, was not intended to serve "the sentencing purposes of incapacitation and punishment." S. Rep. No. 225, *supra*, at 124; see also 18 U.S.C. 3553(a)(2)(A), 3583(c) (excluding from the sentencing considerations applicable to supervised release "provid[ing] just punishment for the offense"). The distinct purposes of supervised release that Congress identified can be adequately served only when a person has been discharged from prison into the community. See *United States* v. *Joseph*, 109 F.3d 34, 38-39 (1st Cir. 1997) ("Incarceration * * * does nothing to assist a defendant's transition back into society and is not a

[7] As noted in our opening brief (at 16), although the Comprehensive Crime Control Act did not identify "protect[ing] the public from further crimes of the defendant" as a sentencing consideration relevant to supervised release, Congress subsequently amended Section 3583(c) to include a reference to that sentencing consideration.

reasonable substitute for a portion of the supervised release term.").[8]

### C. Congress Has Provided An Avenue Of Meaningful Relief For Defendants Who Have Been Incarcerated On A Conviction That Is Subsequently Vacated

Respondent finally contends (Br. 24) that 18 U.S.C. 3583(e)(1) "does not provide meaningful relief" for persons in his circumstances for two reasons: first, Section 3583(e)(1) allows a district court to terminate a term of supervised release only after the defendant has served at least one year of that term, and, second, a district court has discretion under Section 3583(e)(1) whether to terminate a term of supervised release. Because Congress believed that supervised release serves important purposes that are overcome only where there are specific and sufficient countervailing interests, Section 3583(e)(1) does not afford an individual the identical relief—an automatic credit—that would be available under the court of appeals' decision. Section 3583(e)(1) nonetheless provides an avenue of "meaningful relief" that, in contrast to the court of appeals' approach, accords with the congressional purposes underlying supervised release.

[8] It makes no difference whether, as respondent observes (Br. 22), supervised release may, for some purposes, be viewed as punishment. See, *e.g.*, *United States* v. *Dozier*, 119 F.3d 239, 242 (3d Cir. 1997) (concluding that "[s]upervised release is punishment" for ex post facto purposes). Our point is that Congress intended imprisonment and supervised release to serve different purposes. That intent supports construing Section 3624, in accordance with its plain language, as providing that a person's term of supervised release begins only upon his actual release from prison.



Contrary to respondent's assertions (Br. 24-25), there is a significant benefit for an individual who, after serving a one-year term of supervised release, obtains early termination of supervised release under Section 3583(e)(1) based in part on the "interest of justice" reflected in his service of time in prison on a conviction later set aside.[9] And, even before a defendant has served one year of supervised release, Section 3583(e)(2) permits the district court to modify the conditions of his supervised release.

Nor does the district courts' discretion over Section 3583(e)(1) motions for early termination of supervised release render that avenue of relief meaningless. District courts exercise that discretion frequently in favor of defendants. During the year ending September 30, 1998, for example, 1462 former federal prisoners were granted early termination of supervised release. Administrative Office of the United States Courts, *Judicial Business of the United States Courts* 275 (1998).

Moreover, Section 3583(e)(1) requires the district courts to consider whether early termination of supervised release is "warranted by the conduct of the defendant released and the interest of justice," and thus is no longer necessary to achieve the congressionally identified purposes of easing the defendant's transition

[9] Congress recognized the significance of the difference between one-year and three-year terms of supervised release in Section 3583(b), which authorizes a term of supervised release of "not more than three years" for a Class C or Class D felony, but a term of supervised release of "not more than one year" for a Class E felony or a misdemeanor (other than a petty offense). 18 U.S.C. 3583(b)(2) and (3); see also, *e.g.*, 21 U.S.C. 841(b)(1)(D) (requiring a term of supervised release for a particular category of drug offense of "at least 4 years" if the defendant has a criminal record and of "at least 2 years" if the defendant has no criminal record).

into society and protecting the community from a recurrence of his criminal behavior. See S. Rep. No. 225, *supra*, at 124. The court of appeals' remedy—automatic early termination of supervised release for defendants in respondent's position—gives no consideration to those purposes. It would instead reinstate for such defendants the sort of regime that Congress sought to eliminate with supervised release, in which a defendant's period of supervision turned "on the almost sheer accident of the amount of time that happens to remain of the term of imprisonment when the defendant is released," rather than on the needs of the defendant and the community. *Ibid.*[10]

* * * * *

For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

SETH P. WAXMAN
*Solicitor General*

DECEMBER 1999

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[10] Respondent also contends (Br. 23) that requiring him to serve the remaining nine months of his term of supervised release "would not serve any purpose" because he "has been fully and successfully re-integrated into society." The legal issue in this case, however, does not turn on respondent's individual response to release. Respondent's arguments concerning his allegedly "full[] and successful[]" rehabilitation may be presented to the district court on remand in a motion for early termination of supervised release under Section 3583(e)(1).

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No. 98-1696

In The

# Supreme Court of the United States

UNITED STATES OF AMERICA,

*Petitioner,*

v.

ROY LEE JOHNSON,

*Respondent.*

**On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit**

## BRIEF *AMICUS CURIAE* OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND THE FEDERAL DEFENDER ASSOCIATION IN SUPPORT OF RESPONDENT

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## QUESTION PRESENTED

Whether a federal prisoner's term of supervised release (18 U.S.C. §3583) commences on the date of his actual release from prison (18 U.S.C. §3624) or on the earlier date on which he properly should have been released where his sentence of imprisonment – which he had already fully served – was vacated retroactively in the wake of *Bailey v. United States*, 516 U.S. 137 (1995).

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# BRIEF *AMICUS CURIAE* OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND THE FEDERAL DEFENDER ASSOCIATION IN SUPPORT OF RESPONDENT

## INTEREST OF *AMICI*

The National Association of Criminal Defense Lawyers is a District of Columbia non-profit corporation with a membership of more than 10,000 attorneys nationwide – along with 78 state and local affiliate organizations numbering 28,000 members in fifty states. NACDL was founded in 1958 to promote study and research in the field of criminal law and procedure, to disseminate and advance knowledge of the law in the area of criminal justice and practice, and to encourage the integrity, independence and expertise of defense lawyers in criminal cases in the state and federal courts. Foremost among NACDL's objectives is to promote the proper administration of justice. It has appeared before this Court as *amicus curiae* on numerous occasions. *See, e.g., Jones v. United States*, 119 S.Ct. 1215 (1999).

The Federal Defender Association was formed in 1995 to enhance the representation provided under the Criminal Justice Act (18 U.S.C. §3006A) and the Sixth Amendment to the Constitution of the United States. It is a non-profit volunteer organization whose membership includes attorneys and support staff of Federal Defender offices nationwide. One of FDA's missions is to file *amicus curiae* briefs to ensure that the position of indigent defendants in the criminal justice system is properly represented.[1]

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[1] Both parties have consented to the appearance of NACDL and FDA as *amicus curiae* in this matter. No counsel for any party has authored this brief in whole or in part, and no person or entity, other than *amici*, has made a monetary contribution to the preparation or submission of this brief. Sup. Ct. Rule 37.6.

## STATEMENT OF THE CASE

Respondent Roy Lee Johnson was convicted of two counts of use of a firearm in connection with a narcotics offense (18 U.S.C. §924(c)), in addition to two counts of possession with intent to distribute drugs (21 U.S.C. §841(a)) and one count of firearm possession as a previously-convicted felon (18 U.S.C. §922(g)). In addition to consecutive terms of imprisonment totalling 171 months – subsequently reduced to 111 months on appeal – the district court also imposed a three-year term of supervised release (18 U.S.C. §3583(a)) to commence upon the expiration of respondent's term of imprisonment (18 U.S.C. §3624(a)).

After this Court's decision in *Bailey v. United States*, 516 U.S. 137 (1995), respondent moved to vacate his two Section 924(c) convictions, which was granted by the district court, without opposition by the government. Because respondent had already served two and one-half years beyond the 51 months imprisonment to which he had been sentenced on the remaining counts, the district court ordered his immediate release from prison. Pet. App. 2a, 12a.

Nevertheless, the district court refused to credit the two and one-half years he was erroneously imprisoned to respondent's period of supervised release. Holding that Sections 3624(a) & (e) mandate that a "term of supervised release commences on the day the person is released from imprisonment" and "does not run during any period in which the person is imprisoned in connection with a conviction for a Federal, State or local crime" (Pet. App. 15a [quoting §3624(e)]), the district court interpreted the statutory text and the respective purposes of supervised release and imprisonment as fulfilling distinct penological functions, thus warranting separate treatment. Accordingly, the district court refused to credit respondent's two and one-half years of erroneous imprisonment towards his consecutive period of supervised release, ruling that respondent's three year period



of supervised release commenced on the date of his actual release from prison, not the date he should have been released after vacatur of his two erroneous convictions under Section 924(c). Pet. App. 15a-17a.

The court of appeals for the Sixth Circuit reversed. 154 F.3d 569. Pet. App. 4a-5a. The panel held that respondent's term of supervised release began on "the date he was entitled to be released" from prison, "rather than the day he walked out the prison door" (*id.*). Noting that supervised release, while designed to serve rehabilitative purposes, "is also punitive in nature" (*id.*), the panel held that Section 3624(a) "embodies Congress's intent that a prisoner not be held in prison following the expiration of a valid prison term." *Id.* Accordingly, the panel ruled that respondent, whose Section 924(c) convictions were invalid, should not be considered to have been "imprisoned in connection with a conviction for a Federal ... crime", within the meaning of Section 3624(e), during his final two and one-half years of erroneous imprisonment. *Id.* (quoting §3624(e)).

## SUMMARY OF ARGUMENT

The Sentencing Reform Act of 1984 requires prisoners convicted of, *inter alia*, certain federal drug offenses to serve a term of supervised release (18 U.S.C. §3583) to commence upon the completion of their term of imprisonment (18 U.S.C. §3624). Supervised release is thus a part of the original sentence imposed upon the judgment of conviction, to run consecutively to any term of imprisonment imposed by the sentencing court.

By the time he had secured vacatur of his two convictions under 18 U.S.C. §924(c) pursuant to *Bailey v. United States*, 516 U.S. 137 (1995), respondent had already served an erroneous two and one-half years' imprisonment beyond the 51 months' incarceration authorized under the

remainder of his sentence. He is entitled to have that two and one-half years of erroneous imprisonment credited against the consecutive three-year period of supervised release originally imposed.

Supervised release is a consecutive specie of punishment. It is an integral part of the original sentence but it does not ordinarily commence until after a prisoner has completed and is released from his term of imprisonment. Accordingly, by delaying a federal prisoner's release from prison, the government may delay the commencement of the prisoner's consecutive supervised release term and ultimate release from penal supervision.

In this case, where respondent was imprisoned erroneously for over two and one-half years, thereby delaying the completion of his ultimate sentence, the government must credit his erroneous two and one-half years of custodial confinement towards his consecutive period of supervised release. The government, in this case, was blameworthy both for respondent's unduly prolonged incarceration as well as for precluding the commencement of the remainder of his sentence.

Accordingly, the government may not delay the ultimate completion of respondent's total sentence – imprisonment as well as supervised release – beyond that contemplated in the amended judgment of conviction and sentence.



## ARGUMENT

### THE APPLICABLE FEDERAL STATUTES, AS WELL AS PRINCIPLES OF FUNDAMENTAL FAIRNESS AND DUE PROCESS, MANDATE THAT SUPERVISED RELEASE COMMENCES UPON THE EXPIRATION OF A FEDERAL PRISONER'S LAWFUL TERM OF IMPRISONMENT, RATHER THAN THE DATE OF HIS ACTUAL BELATED RELEASE FROM CUSTODY

Under the terms of the Sentencing Reform Act of 1984 (Pub. L. 98-473, Tit. II, ch. II, 98 Stat. 1987), Congress modified the penalty scheme for federal drug offenders by eliminating most forms of parole and replacing them with a new system of supervised release. *Gozlon-Peretz v. United States*, 498 U.S. 395, 400-01 (1991). Under the provisions for supervised release, the sentencing court, rather than the Parole Commission, now oversees an offender's post-imprisonment monitoring. *See* 18 U.S.C. §§3583, 3601. The sentencing court may thus terminate, extend or alter the conditions of the terms of post-imprisonment supervised release prior to its expiration. Supervised release is thus a part of the original sentence imposed upon the judgment of conviction. *See, e.g., United States v. Soto-Olivas*, 44 F.3d 788, 790 (9th Cir. 1995); *United States v. Paskow*, 11 F.3d 873, 881 (9th Cir. 1993); *United States v. Montenegro-Rojo*, 908 F.2d 425, 432 (9th Cir. 1990)(all construing §3583(a) & (e)).

This case thus presents the question of whether the wrongful extension of a federal prisoner's term of incarceration for two and one-half years beyond that legally permissible should go uncredited with respect to a consecutive term of three years' supervised release he is compelled to serve as part of his original sentence. Careful examination of the relevant statutes, as well as principles of

due process and fundamental fairness, mandate that supervised release, as statutorily provided, must be deemed to commence upon the conclusion of a federal prisoner's lawful term of imprisonment, rather than the date of his actual belated release from custody.

### A. Vacatur Of Respondent's §924(c) Convictions Was Compelled As A Matter Of Law, Not A Discretionary Application Of The Retroactivity Doctrine

As a preliminary matter, the government's characterization of the vacatur of respondent's §924(c) convictions as analogous to a discretionary retroactive change in the Sentencing Guidelines cannot go unchallenged. Pet. Br. 10-11 n.5 (distinguishing *United States v. Blake*, 88 F.3d 824, 825 (9th Cir. 1996)). Respondent's two firearms convictions were vacated in this case because, under *Bailey*, they were not crimes within the meaning of the statute. *See Bousley v. United States*, 523 U.S. 614, 626 (1998)(Stevens, J., concurring in part and dissenting in part)("Petitioner's conviction and punishment on the §924(c) charge 'are for an act that the law does not make criminal'. There can be no room for doubt that such a circumstance 'inherently results in a complete miscarriage of justice' and 'present[s] exceptional circumstances that justify collateral relief under [28 U.S.C.] §2255.' *Davis v. United States*, 417 U.S. 333, 346-47 (1974)").

This Court's decision in *Bailey* was thus not a retroactive change in the law. Rather, it was a declaration that the conduct in question was not a crime before as well as after the date of decision. *Bousley*, 523 U.S. at 625-26 (Steven, J., concurring in part and dissenting in part)("This case does not raise any question concerning the possible retroactive application of a new rule of law (citation omitted), because our decision in *Bailey* ... did not change the law. It merely explained what §924(c) had meant ever



since the statute was enacted. *** 'A judicial construction of a statute is an authoritative statement of what the statute meant before as well as after the decision of the case giving rise to that construction'")(quoting *Rivers v. Railway Express, Inc.*, 511 U.S. 298, 313 (1994)). *See also In re Hanserd*, 123 F.3d 922, 927 (6th Cir. 1997)("the overly broad interpretation of the scope of §924(c) was as wrong before *Bailey* as it is now. *Bailey* did not change the statute's meaning; it clarified what §924(c) has always meant since its enactment").[2]

Accordingly, vacatur of respondent's §924(c) convictions was not a discretionary application of a retroactive change in the law beneficial to the defendant. *Cf. Blake*, 88 F.3d at 825. Rather, it was required as a matter of law because respondent's conduct was not criminal -- and he was not eligible to be punished for it -- under *Bailey*.

### B. Supervised Release Is An Integral Part Of The Punishment For The Underlying Offense; As Such, It Is An Integral Part Of The Original Sentence

The lower courts have concluded with virtual uniformity that supervised release is an integral part of the original sentence and that, notwithstanding its rehabilitative concerns, it is also part of the post-incarceration punishment for the offense. *See, e.g., United States v. Soto-Olivas*, 44 F.3d at 790 ("By the plain language of the statute, supervised release, although imposed in addition to the period of incarceration, is 'a part of the sentence' 18 U.S.C. §3583(a).

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[2] *See generally Rivers*, 511 U.S. at 313 n.12 ("[W]hen this Court construes a statute, it is explaining its understanding of what the statute has meant continuously since the date when it became law, ... Thus, it is not accurate to say that the Court's decision ... 'changed' the law that previously prevailed ... when the case was filed. Rather, ... [the] opinion finally decided what [the statute] has always meant and explained why the Courts of Appeals had misinterpreted the will of the enacting Congress").

*** Thus, the entire sentence, including the period of supervised release, is the punishment for the original crime ..."); *United States v. Dozier*, 119 F.3d 239, 241-42 (3d Cir. 1997).

Supervised release, like parole, is thus an integral part of the punishment for the underlying offense:

> Under each, a defendant serves a portion of a sentence in prison and a portion under supervision outside prison walls. If a defendant violates the terms of his release, he may be incarcerated once more under the terms of his original sentence. More specifically, a defendant's original sentence determines the length of the term of parole (indirectly) or supervised release (directly). It is also the original sentence that establishes how long the defendant may be required to serve following revocation in the case of both parole and supervised release violations.

*United States v. Paskow*, 11 F.3d at 881; *see also id.* at 883 (supervised release is "simply part of the whole matrix of punishment which arises out of the defendant's original crimes"); *United States v. Meeks*, 25 F.3d 1117, 1121-22 (2d Cir. 1994)("Because §3583(g) increases the adverse consequences of the violation of conditions that are an integral part of the punishment for the original offense, that section should be viewed as enhancing the sentence for the original crime").

It is thus axiomatic that imprisonment and supervised release both are integral parts of respondent's original sentence which, by operation of law, must be served consecutively. §3624(a) & (e).

Under the circumstances, then, the government has wrongfully imprisoned respondent for two and one-half



years beyond its lawful entitlement, thereby wrongfully delaying the commencement of his consecutive term of supervised release.[3] It should not be permitted to *de facto* lengthen his total period of penal supervision by refusing him credit for his having wrongfully served time under greater supervision than the government was lawfully entitled to impose on him under supervised release. Incarceration, after all, is an even severer punishment than supervised release. *United States v. Montenegro-Rojo*, 908 F.2d at 431 n.8; *United States ex rel. Schuster v. Vincent*, 524 F.2d 153, 161 (2d Cir. 1975)(Kaufman, C.J.)("[S]ince Schuster's prison behavior has satisfied conditions far more strenuous than any the State could or would have imposed in 1969, we must deem Schuster to have completed 5 years of unrevoked parole in 1974").

### C. The Government May Not Unlawfully Delay The Completion Of A Federal Prisoner's Sentence

As Justice Scalia has observed in a closely analogous context, "[I]t is no easy task to determine how many days' imprisonment equals how many dollars' fine equals how many months' probation. Comparing the incommensurate is always a tricky business." *United States v. Granderson*, 511 U.S. 39, 59 (1994)(Scalia, J., concurring in the judgment). Notwithstanding the vagaries of statutory construction, whereby the Court may suffer "the double curse of producing neither textually faithful results nor plausibly intended ones" (511 U.S. at 60), there exists an alternative

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[3] Certainly, by analogy to the provisions of the habeas corpus statutes (28 U.S.C. §§2241 *et seq.*), a prisoner serving consecutive sentences is deemed "'in custody' under any one of them" for purposes of the habeas statute. *Garlotte v. Fordice*, 515 U.S. 39, 45-46 (1995); *see also id.* at 46 ("Under *Peyton* [*v. Rowe, 391 U.S. 54, 67 (1968)*], we view consecutive sentences in the aggregate, not as discrete segments. Invalidation of [petitioner's] conviction would advance the date of his eligibility for release from present incarceration. [His] challenge, which will shorten his term of incarceration if he proves unconstitutionality, implicates the core purpose of habeas review").

solution that does no violence to the statutory language or the purposes of §§3583 and 3624.

There exists a common law rule, which has been held applicable to federal sentencing, providing that unless interrupted by fault of the prisoner (e.g., escape), a prison sentence runs continuously from the date on which the prisoner surrenders to begin serving it. The government is not permitted to delay the expiration of the sentence either by postponing commencement of the sentence or by releasing the prisoner for a time and then reimprisoning him. "The government is not permitted to play cat and mouse with the prisoner, delaying indefinitely the expiation of his debt to society and his reintegration into the free community. Punishment on the installment plan is forbidden." *Dunne v. Keohane*, 14 F.3d 335, 336 (7th Cir. 1994). *See also Shields v. Beto*, 370 F.2d 1003, 1006 (5th Cir. 1967); *United States v. Greenhaus*, 89 F.2d 634, 635 (2d Cir. 1937)(L. Hand & A. Hand, JJ.); *White v. Pearlman*, 42 F.2d 788, 789 (10th Cir. 1930). *See generally* Gabriel J. Chin, *Getting Out Of Jail Free: Sentence Credit For Periods Of Mistaken Release*, 45 Cath. U. L. Rev. 403, 405-11, 420-33 (1996)(collecting federal authority and discussing the continuing vitality of the doctrine in the aftermath of the Sentencing Guidelines).

As Chief Judge Posner noted (*Dunne*, 14 F.3d at 336-37):

> The common law rule has not been successfully invoked for many years, but we are not disposed to question its continued vitality in the core area of its application, when the government is trying to delay the expiration of the defendant's sentence.[4]

[4] This common law rule applies with particular pertinence to respondent, who was in no respect blameworthy with respect to having been incarcerated two and one-half years *longer* than legally required. As the Second Circuit has observed in precisely this regard:

> [B]oth the statutory examples of "conditions of supervised release" and the Guidelines recommendations for such conditions describe specific types of conduct of the defendant that are constrained. In contrast, we view the timing of the term of supervised release – i.e., its beginning, its end, or its interruption – as substantively different, in part because as to timing the defendant is entirely passive. An order specifying the beginning, running, or ending of the period is not itself an order that the defendant do or refrain from doing something.
>
> *United States v. Balogun*, 146 F.3d 141, 146 (2d Cir. 1998).



The doctrine of sentence credit for time erroneously spent at liberty has been recognized and enforced by federal courts of appeals for nine circuits as well as by the courts of at least fourteen state jurisdictions. *See* Chin, 45 Cath. U. L. Rev. at 406-11 (cases and jurisdictions collected therein). Nor is there anything contained in the Sentencing Reform Act of 1984 or the Sentencing Guidelines suggesting that federal statutes or the Guidelines sought either to keep the doctrine or to abolish it. "In fact, the issue probably was never considered by Congress". *Id.* at 429-30.

Nonetheless, the Sentencing Reform Act and the Guidelines, though efforts at consolidation and reform, are not an exclusive expression of the federal law of sentencing. Many common law sentencing rules, which are not set forth in either the Act or the Guidelines, are still regularly invoked and relied upon. *See, e.g., United States v. Wilson*, 503 U.S. 329, 335-36 (1992)("[c]rediting jail-time against federal sentences long has operated in this manner ... 'It is not lightly to be assumed that Congress intended to depart from a long established policy'")(quoting *Robertson v. Railroad Labor Bd.*, 268 U.S. 619, 627 (1925)); *United States v. O'Neil*, 11 F.3d 292, 298 (1st Cir. 1993): *United States v. Blanco*, 888 F.2d 907, 910 (1st Cir. 1989)("[T]he guidelines represent an approach that begins with, and builds upon, pre-guidelines practice"). *See generally* 2B Norman J. Singer, *Sutherland Statutory Construction* §50.01, at 90 (5th ed. 1992)("Absent an indication that the legislature intends a

statute to supplant the common law, the courts should not give it that effect").

These cases thus point to the proper resolution of the instant case. Here, of course, respondent wasn't improperly released from custody. On the contrary, he was erroneously over-incarcerated for a period of two and one-half years, thereby delaying the commencement of his supervised release, through no fault of his own. Certainly, if a prisoner is entitled to have periods of erroneous liberty credited against the expiration of his prison time, principles of fundamental fairness dictate that excess imprisonment be credited toward a term of far less onerous "supervision". *Schuster v. Vincent*, 524 F.2d at 160 (citing 2 Pomeroy, *Equity Jurisprudence* §363 (5th ed. 1941)(collecting cases)(equity regards as done what ought to have been done and resolves uncertainties against those whose wrongful acts or omission created them); *Bigelow v. RKO Radio Pictures*, 327 U.S. 251, 265 (1946)).



## CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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